CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 30 NOVEMBER 27, 1996 NO. 48

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

General Notices

COPYRIGHT, TRADEMARK, AND TRADE NAME RECORDATIONS

(No. 10–1996)

AGENCY: U.S. Customs Service, Department of the Treasury.

SUMMARY: The copyrights, trademarks, and trade names recorded with the U.S. Customs Service during the month of October 1996 follow. The last notice was published in the CUSTOMS BULLETIN on October 30, 1996.

Corrections or information to update files may be sent to U.S. Customs Service, IPR Branch, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: John F. Atwood, Chief, Intellectual Property Rights Branch, (202) 482–6960.

Dated: November 12, 1996.

KARL WM. MEANS,
Acting Chief,
Intellectual Property Rights Branch.

The list of recordations follow:

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
COP9600260	19961018	20161018	ANDRE' HARVEY BRONZE SCULPTURE CATALOGUE	ANDRE' HARVEY	N
COP9600261	19961023	20161023	CRUISE SHIP	JOSEPH K & CO.	N
COP9600262	19961024	20161024	SYCAMORE BED FRAME	L&P PROPERTY MANAGEMENT COMPANY	N
COP9600263	19961024	20161024	BASE CODE, AHA-2940/J95 CS=7800 955402-00JA REV.A	ADAPTEC, INC.	N
COP9600264	19961024	20161024	BASE CODE, 398X/398XW CS=0B00 926105-00 REV.A	ADAPTEC, INC.	N
COP9600265	19961025	20161026	QUAKE	ID SOFTWARE INC.	N
COP9600266	19961025	20161024	ROSE	JAN MCLEAN	N
COP9600267	19961025	20161025	AUBUSSON WEAVE 73G	RENAISSANCE CARPET & TAPESTRY	N
COP9600268	19961025	20161025	AUBUSSON WEAVE 19G	RENAISSANCE CARPET & TAPESTRY	N
COP9600269	19961025	20161025	AUBUSSON WEAVE 180	RENAISSANCE CARPET & TAPESTRY	N
COP9600270	19961025	20161025	AUBUSSON WEAVE 41	RENAISSANCE CARPET & TAPESTRY	N
COP9600271	19961025	20161025	AUBUSSON WEAVE 22	RENAISSANCE CARPET & TAPESTRY	N
COP9600272	19961025	20161025	AUBUSSON WEAVE 50	RENAISSANCE CARPET & TAPESTRY	N
COP9600273	19961025	20161025	SAVONNERIE S-25	RENAISSANCE CARPET & TAPESTRY	N
COP9600274	19961025	20161025	AUBUSSON WEAVE 49	RENAISSANCE CARPET & TAPESTRY	N
COP9600275	19961025	20161025	SAVONNERIE S-7	RENAISSANCE CARPET & TAPESTRY	N
COP9600276	19961028	20161028	DOLPHIN SQUEEZIE	ALPI INTERNATIONAL LTD.	N
COP9600277	19961028	20161028	MARINE LIFE SQUEEZIES-WALRUS	ALPI INTERNATIONAL LTD.	N
COP9600278	19961028	20161028	MARINE LIFE SQUEEZIES-SEAL	ALPI INTERNATIONAL LTD.	N
COP9600279	19961028	20161028	MARINE LIFE SQUEEZIES-SEA OTTER	ALPI INTERNATIONAL LTD.	N
COP9600280	19961028	20161028	MARINE LIFE SQUEEZIES-KILLER WHALE	ALPI INTERNATIONAL LTD.	N
COP9600281	19961028	20161028	MARINE LIFE SQUEEZIES-HAMMERHEAD SHARK	ALPI INTERNATIONAL LTD.	N
COP9600282	19961028	20161028	MARINE LIFE SQUEEZIES-POISON DART FROG	ALPI INTERNATIONAL LTD.	N
COP9600283	19961028	20161028	BARNYARD SQUEEZIES-COW	ALPI INTERNATIONAL LTD.	N
COP9600284	19961028	20161028	BARNYARD SQUEEZIES-PENGUIN	ALPI INTERNATIONAL LTD.	N
COP9600285	19961028	20161028	BARNYARD SQUEEZIES-CHICKEN	ALPI INTERNATIONAL LTD.	N
COP9600286	19961028	20161028	BARNYARD SQUEEZIES-PIG	ALPI INTERNATIONAL LTD.	N
COP9600287	19961031	20161031	MORSE CODE AND CHEVRON AND HOSEL DESIGN	COBRA GOLF INC.	N
SUBTOTAL RECORDATION TYPE		28			
TMK9600641	19961018	20060406	CARELLO	MAGNETI MARELLI S.P.A.	N
TMK9600642	19961018	20050509	BREATH ASURE	BREATH ASURE INC.	Y
TMK9600643	19961018	20040621	LEARNING ROAD AND DESIGN	PLAYINGS INTERNATIONAL LTD.	Y
TMK9600644	19961022	20020901	KITCHENAID MIXER DESIGN	WHIRLPOOL PROPERTIES INC.	N
TMK9600645	19961022	20030622	QUARKDISPATCH	QUARK INC.	N
TMK9600646	19961022	20041011	QPS	QUARK INC.	N
TMK9600647	19961022	20010903	QUARKXTENSIONS	QUARK INC.	N
TMK9600648	19961022	20090404	QUARK	QUARK INC.	N
TMK9600649	19961022	20051205	XTENSIONS	QUARK INC.	N
TMK9600650	19961022	20040927	QUARK PUBLISHING SYSTEM	QUARK INC.	N
TMK9600651	19961022	20030629	QUARKCOPYDESK	QUARK INC.	N
TMK9600652	19961022	20021219	BILL BLASS	BILL BLASS LTD.	Y
TMK9600653	19961022	20090131	V DESIGN	MARIO VALENTINO S.P.A.	N
TMK9600654	19961022	20070901	MV LOGO	MARIO VALENTINO S.P.A.	N
TMK9600655	19961022	20030130	VALENTINO	MARIO VALENTINO S.P.A.	N
TMK9600656	19961022	20040212	MARIO VALENTINO	MARIO VALENTINO S.P.A.	N
TMK9600657	19961022	20020609	MARIO VALENTINO	MARIO VALENTINO S.P.A.	N
TMK9600658	19961022	20060514	PANAX RED GINSENG EXTRACTUM & DESIGN	CHUNG INC.	Y

REC NUMBER	EFF DT	EXP DT	NAME OF COP, TMK, TNM OR MSK	OWNER NAME	RES
TMK9600659	19961022	20070106	LM & DESIGN	OMT ENTERPRISES, INC.	Y
TMK9600660	19961022	20060820	RELIANCE 1000	VIGILANT INCORPORATION	N
TMK9600661	19961023	20030514	STRAW BOTTLE DESIGN	WEST INDIES BAY COMPANY	N
TMK9600662	19961023	20001106	PARTY STRING	RHODE ISLAND NOVELTY COMPANY	N
TMK9600663	19961023	20020818	INVICTA	ARTIME S.P.A.	N
TMK9600664	19961023	20041023	SEBAGO & COBBLER DEVICE	SEBAGO INC.	N
TMK9600665	19961023	20041023	SEBAGO DOCKSIDES & COBBLER DEVICE	SEBAGO INC.	N
TMK9600666	19961023	20021010	OPTOLYTH	WALTER ROTH	N
TMK9600667	19961023	20060406	POWERTRAK	TRAK INTERNATIONAL INC.	N
TMK9600668	19961023	20050216	EASY MASK	DAUBERT COATED PRODUCTS INC.	N
TMK9600669	19961023	20060702	OPTICARE	POLY VAC, INC.	N
TMK9600670	19961023	20021229	PRO SELECT	PRO SELECT INC.	N
TMK9600671	19961023	20090905	PRO SELECT	PRO SELECT INC.	N
TMK9600672	19961023	20040203	SMITH & WESSON	SMITH & WESSON CORPORATION	N
TMK9600673	19961023	20030309	S&W MONOGRAM	SMITH & WESSON CORPORATION	N
TMK9600674	19961023	20021020	S&W MONOGRAM	SMITH & WESSON CORPORATION	N
TMK9600675	19961023	20020804	SMITH & WESSON	SMITH & WESSON CORPORATION	N
TMK9600676	19961023	20081108	SMITH & WESSON	SMITH & WESSON CORPORATION	N
TMK9600677	19961023	20031014	S&W	SMITH & WESSON CORPORATION	N
TMK9600678	19961023	20090404	QUARK XPRESS	QUARK INC.	N
TMK9600679	19961023	20041018	CALVIN KLEIN	CALVIN KLEIN TRADEMARK TRUST	N
TMK9600680	19961023	20040201	CALVIN KLEIN	CALVIN KLEIN TRADEMARK TRUST	N
TMK9600681	19961023	20060123	CK/CALVIN KLEIN	CALVIN KLEIN TRADEMARK TRUST	N
TMK9600682	19961023	20051026	CK CALVIN KLEIN	CALVIN KLEIN TRADEMARK TRUST	N
TMK9600683	19961023	20060109	CK ONE	CALVIN KLEIN TRADEMARK TRUST	N
TMK9600684	19961023	20060423	DESIGN OF CK ONE	CALVIN KLEIN TRADEMARK TRUST	N
TMK9600685	19961024	20060820	HADAR	PRESIDENT FOODS LTD.	N
TMK9600686	19961024	20030413	AHA	ADAPTEC INC.	N
TMK9600687	19961025	20051024	FLOR DE MANILA	TIRSO DE UBAGO	Y
TMK9600688	19961025	20060320	CROSBY & DESIGN	CROSBY GROUP, INC	N
TMK9600689	19961025	20060907	ROMEO Y JULIETA	MAX ROHR IMPORTER INC.	Y
TMK9600690	19961025	20070616	SIMS	THOMAS PAUL SIMS	Y
TMK9600691	19961025	20001204	ESSIAC	ESSIAC PRODUCTS SERVICES INC.	N
TMK9600692	19961028	20051203	LIGO WITH DESIGN	LIBERTY GOLD FRUIT CO., INC.	Y
TMK9600693	19961028	20051203	LIGO WITH DESIGN	LIBERTY GOLD FRUIT CO., INC.	Y
TMK9600694	19961028	20060806	MEDALLION OUTLINE	CALLAWAY GOLF COMPANY	N
TMK9600695	19961028	20060625	GREAT BIG BERTHA	CALLAWAY GOLF COMPANY	N
TMK9600696	19961028	20080301	DAYLIGHTER & DESIGN	KC HILITES INC.	Y
TMK9600697	19961028	20040918	DAYLIGHTER	KC HILITES INC.	Y
TMK9600698	19961028	20040731	KC AND DESIGN	KC HILITES INC.	Y
TMK9600699	19961028	20000920	PING	KARSTEN MANUFACTURING CORP.	N
TMK9600700	19961028	20050219	WORTHINGTON	INGERSOLL-DRESSER PUMP COMPANY	N
TMK9600701	19961028	20060521	REALM	EROX CORPORATION	N
TMK9600702	19961028	20020810	PALMETTO'S	KNIGHT TEXTILE CORPORATION	Y
TMK9600703	19961031	20060203	GRATEFUL DEAD WITH SKULL DESIGN	GREATFUL DEAD MERCHANDISING INC.	N

SUBTOTAL RECORDATION TYPE 63

TOTAL RECORDATIONS ADDED THIS MONTH 91

PROPOSED COLLECTION; COMMENT REQUEST

TRANSFER OF CARGO TO A CONTAINER STATION

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Transfer of Cargo to a Container Station. . This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 13, 1997, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Transfer of Cargo to a Container Station

OMB Number: 1515–0142

Form Number: N/A

Abstract: The container station operator may file an application for transfer of a container intact to a container station which is mover from

the place of unlading or from a bonded carrier after transportation in-bond before filing of the entry for the purpose of breaking bulk and redelivery.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 360
Estimated Time Per Respondent: 6 minutes
Estimated Total Annual Burden Hours: 1,872
Estimated Total Annualized Cost on the Public: $18,720

Dated: October 31, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, November 14, 1996 (61 FR 58440)]

PROPOSED COLLECTION; COMMENT REQUEST

TEXTILE AND TEXTILE PRODUCTS

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning Textile and Textile Products. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 13, 1997, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

REQUEST FOR COMMENTS:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pur-

suant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Textile and Textile Products
OMB Number: 1515–0140
Form Number: N/A

Abstract: Information is needed for Customs to be able to identify the Country of Origin of Textiles. The requirement prevents circumvention of bilateral agreements and ensures the proper assessment of duties. The declaration will be executed by the foreign manufacturer, exporter, or U.S. importer to be filed with the entry.

Current Actions: There are no changes to the information collection.
Type of Review: Extension (without change)
Affected Public: Businesses.
Estimated Number of Respondents: 45,810
Estimated Time Per Respondent: 7 minutes
Estimated Total Annual Burden Hours: 133,582
Estimated Total Annualized Cost on the Public: $51,469,402.00

Dated: November 7, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, November 14, 1996 (61 FR 58439)]

PROPOSED COLLECTION; COMMENT REQUEST

APPLICATION FOR WITHDRAWAL OF BONDED STORES FOR FISHING VESSELS AND CERTIFICATION OF USE

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Application for Withdrawal of Bonded Stores

For Fishing Vessels and Certification of Use. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 13, 1997, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Application for Withdrawal of Bonded Stores For Fishing Vessels and Certification of Use

OMB Number: 1515–0032

Form Number: Customs Form 5125

Abstract: The Customs Form 5125 is used for the withdrawal and lading of bonded merchandise (especially alcoholic beverages) for use on board fishing vessels and foreign or domestic vessels involved in international trade. The form also certifies the use: total consumption or partial consumption with secure storage for use on next voyage.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Businesses.
Estimated Number of Respondents: 500
Estimated Time Per Respondent: 5 minutes
Estimated Total Annual Burden Hours: 42
Estimated Total Annualized Cost on the Public: $504.00

Dated: October 31, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, November 14, 1996 (61 FR 58437)]

PROPOSED COLLECTION; COMMENT REQUEST

MEDICAL HISTORY FORM

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Medical History Form. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 13, 1997, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Medical History Form

OMB Number: 1515–0202

Form Number: Customs Forms 426 and 427

Abstract: These forms are used to determine medical history of persons tentatively selected for positions that are considered arduous or hazardous. This information is provided to the physician who conduct the physical examinations prior to final selection.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)

Affected Public: Individuals

Estimated Number of Respondents: 700

Estimated Time Per Respondent: 45 minutes

Estimated Total Annual Burden Hours: 525

Estimated Total Annualized Cost on the Public: $6,300

Dated: October 31, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, November 14, 1996 (61 FR 58438)]

PROPOSED COLLECTION; COMMENT REQUEST

U.S. CUSTOMS DECLARATION (CUSTOMS FORM 6059B)

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the U.S. Customs Declaration. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 13, 1997, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Information Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: U.S. Customs Declaration

OMB Number: 1515–0041

Form Number: Customs Form 6059B

Abstract: The U.S. Customs Declaration, Customs Form 6059B, facilities the clearance of persons and their goods arriving in the territory on the U.S. by requiring basic information necessary to determine Customs exception status and if any duties of taxes are due. The form is also

used for the enforcement of Customs and other agencies laws and regulations.

Current Actions: There are no changes to the information collection. This submission is being submitted to extend the expiration date.

Type of Review: Extension (without change)
Affected Public: Individuals, travelers.
Estimated Number of Respondents: 39,000,000
Estimated Time Per Respondent: 3 minutes
Estimated Total Annual Burden Hours: 1,950,000
Estimated Total Annualized Cost on the Public: N/A

Dated: October 31, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, November 14, 1996 (61 FR 58438)]

PROPOSED COLLECTION; COMMENT REQUEST

REQUIRED RECORDS FOR SMELTING AND REFINING WAREHOUSES

AGENCY: U.S. Customs, Department of the Treasury.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork and respondent burden, Customs invites the general public and other Federal agencies to comment on an information collection requirement concerning the Required Records for Smelting and Refining Warehouses. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)).

DATES: Written comments should be received on or before January 13, 1997, to be assured of consideration.

ADDRESS: Direct all written comments to U.S. Customs Service, Printing and Records Services Group, Room 6216, 1301 Constitution Ave., NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to U.S. Customs Service, Attn.: J. Edgar Nichols, Room 6216, 1301 Constitution Avenue NW, Washington, D.C. 20229, Tel. (202) 927–1426.

SUPPLEMENTARY INFORMATION:

Customs invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pur-

suant to the Paperwork Reduction Act of 1995 (Public Law 104–13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) the annual costs burden to respondents or record keepers from the collection of information (a total capital/startup costs and operations and maintenance costs). The comments that are submitted will be summarized and included in the Customs request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document Customs is soliciting comments concerning the following information collection:

Title: Required Records for Smelting and Refining Warehouses
OMB Number: 1515–0135
Form Number: N/A
Abstract: Each manufacturer engaged in smelting or refining must file an annual statement showing any material change in the character of the metal-bearing materials used or changes in the method of smelting or refining. Also the records must show the receipt and disposition of each shipment.
Current Actions: There are no changes to the information collection.
Type of Review: Extension (without change)
Affected Public: Business or other for-profit institutions
Estimated Number of Respondents: 15
Estimated Time Per Respondent: 85 hours
Estimated Total Annual Burden Hours: 1,325
Estimated Total Annualized Cost on the Public: $15,900

Dated: October 31, 1996.

V. CAROL BARR,
Printing and Records Services Group.

[Published in the Federal Register, November 14, 1996 (61 FR 58439)]

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, November 12, 1996.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

JOHN DURANT,
(for Stuart P. Seidel, Assistant Commissioner,
Office of Regulations and Rulings.)

MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF BARN CLEANER REPLACEMENT CHAIN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling relating to the tariff classification of barn cleaner replacement chain. These articles are lengths of chain in a hook-and-eye arrangement each link having a J shape at one end and the other end looped or closed. Iron or steel paddles are welded to this chain at regular intervals. Notice of the proposed modification was published on October 2, 1996, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 27, 1997.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Tariff Classification Appeals Division (202) 482–7030.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling relating to the tariff classification of barn cleaner replacement chain. Customs invites comments on the correctness of the proposed modification.

In *HQ* 958875, dated April 17, 1996, certain barn cleaner replacement chain, described as hook-and-eye chain with steel paddles welded at regular intervals was held to be classifiable as other chain and parts thereof, of iron or steel, in subheading 7315.89.50, Harmonized Tariff Schedule of the United States (HTSUS). This classification was based on the fact the chain was not articulated link chain which would be classifiable in another provision of heading 7315. *HQ* 958875 also held that the chain was eligible for duty-free entry under heading 9817.00.60, HTSUS, as parts to be used in agricultural machinery provided for in heading 8436. *HQ* 958875 is set forth as "Attachment A" to this document.

It is now Customs position that while the chain remains classifiable in subheading 7315.89.50, it is not eligible under the provision in HTS heading 9817.00.60. The chain is a part of material handling machinery of heading 8428 but cannot be classified as a part because articles of heading 7315 are "parts of general use" and are excluded from chapter 84 by virtue of Note 1(g) to Section XVI. As the chain no longer qualifies as a part to be used in articles provided for in heading 8436, it is not eligible for duty-free entry under heading 9817.00.60.

Customs intends to modify *HQ* 958875 to reflect that the proper classification of barn cleaner replacement chain continues to be under subheading 7315.89.50, HTSUS, but that it is not eligible under the provision in HTS heading 9817.00.60. Before taking this action, we will give consideration to any written comments timely received. Proposed *HQ* 959658, modifying *HQ* 958875, is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 6, 1996.

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, November 6, 1996.

CLA–2 RR:TC:MM 959658 JAS
Category: Classification
Tariff No. 7315.89.50

MR. JOHN CANTWELL
A. N. DERINGER, INC.
P.O. Box 43, Rt. 37
Massena, NY 12937–0824

Re: *HQ* 958875 modified, barn cleaner replacement chain; iron or steel hook-and-eye chain with welded paddles; articulated chain, other chain; Heading 9817.00.60, parts to be used in articles provided for in Heading 8436.

DEAR MR. CANTWELL:

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification *HQ* 958875, dated April 17, 1996, was published on October 2, 1996, in the CUSTOMS BULLETIN, Volume 30, Number 40.

Facts:

As stated in *HQ* 958875, the barn cleaner replacement chain is iron or steel chain in a hook-and-eye arrangement with each link having a J shape at one end and the other end looped or closed. Iron or steel shapes or paddles, each typically measuring 2 inches × 2 inches × ¼ inch, are welded to this chain at regular intervals. Chain of this type operates in continuous rotation in dairy-barns in connection with a metor, drive shaft and clutch pulley to sweep away animal wastes.

The provisions under consideration are as follows:

7315	Chain and parts thereof, of iron or steel:
	Articulated link chain and parts thereof:
7315.12.00	Other chain * * * 3.4 percent *ad valorem*
	Other chain:
7315.89	Other:
7315.89.50	Other * * * 5.3 percent *ad valorem*
* * * * * * *	
8428	Other lifting, handling, loading or unloading machinery * * *:
8428.90.00	Other machinery * * * 1.2 percent *ad valorem*
* * * * * * *	
8436	Other agricultural, horticultural, forestry, poultry-keeping or bee-keeping machinery * * * poultry incubators and brooders * * *:
* * * * * * *	
9817.00.50	Machinery, equipment and implements to be used for agricultural or horticultural purposes * * *Free
* * * * * * *	
9817.00.60	Parts to be used in articles provided for in headings 8432, 8433, 8434 and 8436, whether or not such parts are principally used as parts of such articles and whether or not covered by a specific provision within the meaning of additional U.S. Rule of Interpretation 1(c) * * * Free

Issue:

Whether hook-and-eye chain with paddles is eligible for duty-free entry under heading 9817.00.60.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in

part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description And Coding System Explanatory Notes (ENS) constitute the official interpretation of the Harmonized System. While not legally binding, and therefore not dispositive, the **ENS** provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the **ENS** should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

For the reasons stated in *HQ* 958975, the barn cleaner replacement chain remains classifiable in subheading 7315.88.50, HTSUS, as other chain and parts thereof, of iron or steel. However, it is *not* eligible for classification in heading 9817.00.60, HTSUS. While we stated in *HQ* 958875 that an importation of barn cleaner replacement chain, as described, plus motor, drive shaft, and clutch pulley, imported assembled or unassembled, would be considered agricultural machinery of heading 8436, we failed to consider that it was also material handling machinery of heading 8428. Incidentally, the chain cannot be classified as a part of handling machinery because articles of heading 7315 are "parts of general use" and are excluded from Chapter 84 by virtue of Note 1(g) to Section XVI.

Relevant **ENS** at p. 1218, under (d) *exclude* from heading 84.36 pneumatic or "blower" type elevators; winches for uprooting, dragging or loading trees, logs, etc.; and other hoisting, handling or conveying equipment (heading 84.25, 84.26 or 84.28). Because the cited **ENS** eliminate heading 8436 from consideration when in competition with heading 8428, the barn cleaner replacement chain is not a part to be used in agricultural machinery of heading 8436. Therefore, it is not eligible for duty-free entry under heading 9817.00.60, HTSUS.

Holding:

Under the authority of GRI 1, the barn cleaner replacement chain with welded paddles, as described, is provided for in heading 7315. It remains classifiable in subheading 7315.89.50, HTSUS. However, for the reasons stated, this chain is *not* eligible for classification in heading 9817.00.60, HTSUS.

HQ 958875 is modified according. In accordance with 19 U.S.C. 1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. 1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

MARVIN M. AMERNICK,
(for John Durant, Director,
Tariff Classification Appeals Division.)

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AN INFANT'S TOWEL AND WASHCLOTH

AGENCY: U.S. Customs Service, Department of Treasury.

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat, 2057), this notice advises interested patties that Customs intends to modify a ruling pertaining to the tariff classification of an infant's hooded towel and washcloth.

DATE: Comments must be received on or before December 27, 1996.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Tariff Classification Appeals Division, 1301 Constitution Avenue, NW (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Tariff Classification Appeals Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th Street, NW, Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Rebecca A. Hollaway, Tariff Classification Appeals Division (202) 482–6996.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of the Tariff Act of 1930 (19 U.S.C. 1625(c)(1), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that customs intends to modify a ruling letter pertaining to the tariff classification of an infant's hooded towel and washcloth.

In NY A80050, dated March 11, 1995, an infant's towel and wash cloth, style number HT125, were classified under 6111.20.6040, Harmonized Tariff Schedule of the United States (HTSUS). NY A80050 is set forth as "Attachment A" to this document. It is Customs position that the items are correctly classifiable under subheading 6302.60.0020 (hooded towel) and 6302.60.0030 (wash cloth). Customs intends to modify NY A80050 to reflect the proper classification of these items. Before taking this action, we will give consideration to any written comments timely received. Proposed HQ 959180 modifying NY A80050 is set forth as "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.0), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: November 7, 1996.

JOHN ELKINS,
(for John Durant, Director,
Tariff Classification Appeals Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, March 11, 1995.

CLA–2–61:63:RR:NC:WA:5:358 A80050
Category: Classification
Tariff No. 6111.20.6040 and 6307.90.9989

MS. DANA DAUTERIVE
HAMCO, INC.
16131 Highway 44 North
Prairieville, LA 70769

Re: The tariff classification of an infant's hooded bath towel, wash cloth, burp cloth, feeder bib, mittens and bodies from China.

DEAR MS. DAUTERIVE:

In your letter dated February 2, 1996, you requested a tariff classification ruling. The submitted samples are described as follows:

Style HT125—an infant's hooded towel and washcloth. Both items are knit and constructed from 75% cotton and 25% polyester fibers. The towel has an embroidered applique design on the hood.

Style BC625—an infant's terry burp cloth. The item is knit and constructed from, 75% cotton and 25% polyester fibers. It has a jersey lining and embroidered applique design on the front.

Style FB325—an infant's terry feeder bib. The item is knit and constructed from 75% cotton and 25% polyester fibers. It has an embroidered applique design on the front.

Style MBS225—a pair of infant's mittens and booties. Both items are knit and constructed from 100% cotton fibers.

The applicable subheading for *Styles HT125, FB325 and MBS225,* will be 6111.20.6040, Harmonized Tariff Schedule of United States (HTS), which provides for Babies' garments and the clothing accessories, knitted or crocheted, of cotton, other, other. The rate of duty will be 8.5% *ad valorem*.

Style #'s HT125, FB325 and MBS225 fall within textile category designation 239. Based upon textile trade agreements, products of China are presently subject to quota restraints and visa requirements.

The applicable subheading for *Style BC625* will be 6307.90.9989, Harmonized Tariff Schedule of the United States (HTS), which provides for other made up articles * * * other: other: other: other. The rate of duty will be 7% *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas*

(Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regardIng the ruling, contact National Import Specialist Bruce Kirschner at 212–466–5865.

ROGER J. SILVESTRI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:TC:TE 959180 RH
Category: Classification
Tariff No. 6302.60.0020 and 6302.60.0030

MS. DANA DAUTERIVE
HAMCO, INC.
16131 Highway 44 North
Prairieville, LA 70769

Re: Modification of A80050; infant's hooded bath towel; wash cloth; Subheading 6302.60.0030; Subheading 6302.00.0020.

DEAR MS. DAUTERIVE:

This is in reply to your letter of March 18, 1996, seeking modification of NY A80050, dated March 11, 1995. In that ruling, a hooded towel and wash cloth set, style HT125, were incorrectly classified under subheading 6111.20.6040, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). You do not dispute the classification of the other merchandise in that ruling.

Facts:

The merchandise under consideration is an infant's hooded towel and washcloth, style number HT125. Both items are constructed from 75 percent cotton and 25 percent polyester knit fibers. The towel has an embroidered applique design on the hood. The items are packaged together for retail sale. A sample of the merchandise was submitted for our review.

Issue:

What is the appropriate classification for an infant's hooded towel and wash cloth which are packaged together for retail sale?

Law and Analysis:

Classification of goods under the HTSUSA is governed by the General Rules of Interpretation (GRIs) GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in their appropriate order. GRI 1 governs the classification of the hooded towel and washcloth. Since both articles are classifiable under the same 8-digit tariff classification, subheading 6302.60.00, HTSUSA, which provides for toilet linen of terry fabrics, the portion of GRI 3(b) which refers to "goods put up in sets for retail sale" is not applicable.

The Explanatory Notes, which constitute the official interpretation of the HTSUSA at the international level, state in Note (X) to Rule 3(b) that the term "goods put up in sets for retail sale" means goods which:

(a) consist of at least two different articles which are, prima facie, classifiable in different headings;
(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
(c) are put up in a manner suitable for sale directly to users without repacking.

As stated above, the towel and washcloth are both classifiable under subheading 6302,60.00, and therefore, do not qualify as a "set" under GRI 3(b). Accordingly, the towel and washcloth will be classified separately, the hooded towel is classifiable under subheading 6302.60.0020, HTSUSA, and the wash cloth is classifiable in subheading 6302.60.0030, HTSUSA.

Holding:

In view of the foregoing, the hooded towel is classified under subheading 6302,60.0020, HTSUSA, which provides for "Bed linen, table linen and kitchen linen: Toilet linen and kitchen linen, of terry toweling or similar terry fabrics, of cotton. * * * Towels: Other." It is dutiable as a product of China, Hong Kong and Thailand at the general rate of 10.1 percent *ad valorem* and the textile category is 363.

The washcloth is classified in subheading 6302.60.0030, HTSUSA, which provides for "Bed linen, table linen, and kitchen linen: Toilet linen and kitchen linen of terry toweling or similar terry fabrics, of cotton * * *" Other. It has the same duty rate as the hooded towel, but the textile category is 369.

NY A80050 is modified accordingly.

JOHN DURANT,
Director,
Tariff Classification Appeals Division.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
R. Kenton Musgrave
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Dominick L. DiCarlo

Nicholas Tsoucalas

Clerk

Raymond F. Burghardt

Decisions of the United States Court of International Trade

(Slip Op. 96–168)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TORRINGTON CO. AND FEDERAL-MOGUL CORP., DEFENDANT-INTERVENORS

Court No. 92–07–00505

(Dated October 17, 1996)

ORDER

TSOUCALAS, *Senior Judge:* On October 3, 1996, pursuant to a decision on August 12, 1996, the United States Court of Appeals for the Federal Circuit ("CAFC") remanded one issue arising from the final results of Commerce's administrative review, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; et al.; Final Results of Antidumping Duty Administrative Reviews,* 57 Fed. Reg. 28,360 (1992).

In accordance with the decision and mandate of the CAFC, it is hereby

ORDERED that this case is remanded to the Department of Commerce, International Trade Administration ("Commerce"), to either include or exclude both of the doubtful debt reserve accounts in the calculations of home market indirect selling expenses and United States indirect selling expenses; and it is further

ORDERED that Commerce will report the results of this remand to the Court within sixty (60) days of the entry of this order.

(Slip Op. 96–169)

ANGUS CHEMICAL CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–06–00334

[Determination of the International Trade Commission Sustained.]

(Decided October 18, 1996)

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, Larry Hampel and *Joseph A. Perna, V); Novak & Macey (Stephen Novack, P. Andrew Fleming* and *Sandra E. Raitt),* for plaintiff.
Lyn M. Schlitt, General Counsel, *James A. Toupin,* Deputy General Counsel, Office of the General Counsel, United States International Trade Commission *(Lyle B. Vander Schaaf),* for defendant.

MEMORANDUM OPINION

DICARLO, *Chief Judge:* Plaintiff, Angus Chemical Company, moves for judgment on the agency record and for an order setting aside the negative injury determination by the United States International Trade Commission with respect to nitromethane from the People's Republic of China. *Nitromethane from the People's Republic of China,* 59 Fed. Reg. 24,470 (Int'l Trade Comm'n 1994). Although the Department of Commerce in its parallel investigation determined the imports were sold at a dumping margin of 233.7 percent, *Nitromethane from the People's Republic of China,* 58 Fed. Reg. 59,237, 59,239 (aff. prelim. determination, sales at LTFV) (Dep't Comm. 1993) [hereinafter *ITA Preliminary Determination],* a majority of the Commission found that the U.S. nitromethane industry was not materially injured or threatened with material injury by reason of imports of nitromethane from the People's Republic of China (PRC). *Nitromethane from the People's Republic of China,* USITC Pub. 2773, Inv. No. 731–TA–650 (Final) I–5 (May 1994) [hereinafter *ITC Final Determination].* Angus now challenges the Commission's findings.

BACKGROUND

Angus, presently the sole American producer of nitromethane, filed a petition for the imposition of antidumping duties on imports of nitromethane from the PRC. Nitromethane is one of a group of chemicals known as nitroalkanes, which consist of an alkane molecule, such as methane, ethane, or propane, where one of the hydrogen atoms has been replaced by a nitro group (NO_2). Nitromethane is used in a number of products, including chloropicrin, hobby fuels, racing fuels, explosives, degreasing solvents, preservatives, pharmaceuticals, and pharmaceutical intermediates. Angus's nitromethane production process results in the joint production of four nitroalkanes—nitromethane, nitroethane, 1–nitropropane, and 2–nitropropane. Of these products, nitromethane has the highest value. (Br. in Supp. of Pl.'s Mot. for J. on the Agency R. at 7–8 & n.5) [hereinafter Pl.'s Br.].

1. *The Investigation:*

In 1990, there were virtually no Chinese imports in the U.S. market. After a May 1, 1991 explosion at the Angus plant, Angus began import-

ing significant quantities of nitromethane from the PRC to meet existing nitromethane contracts and for use in Angus's downstream production of nitromethane derivatives. By March of 1992, Angus's plant had returned to partial operation. Roughly half of its nitroalkane production capacity had been restored. Angus ceased importing nitromethane from the PRC, although PRC nitromethane producers continued to sell nitromethane in the U.S. until August 1993. *Id.* at 9–10.

During the period of investigation, the only other U.S. producer of nitromethane was W.R. Grace & Co. Grace's production method also resulted in production of nitromethane and three other nitroalkane products. *Id.* at 8. Grace exited the market in mid–1992 for reasons unrelated to the Less Than Fair Value (LTFV) Sales. *ITC Final Determination* at I–9 to I–10. The Commission defined the domestic industry to include both Angus and Grace. *Id.* at I–7.

In its antidumping investigation, Commerce found Chinese nitromethane was sold at a dumping margin of 233.7 percent. *Id.* at II–4. When Commerce issued its preliminary LTFV determination in November 1993, it found there had been a surge of imports which constituted sufficient "critical circumstances." *ITA Preliminary Determination,* 58 Fed. Reg. at 59,238–39. The effective date for potential duty assessment was therefore set retroactively to August 10, 1993. *Nitromethane from the People's Republic of China,* 59 Fed. Reg. 14,834, 14,836 (aff. final determination, sales at LTFV) (Dep't Comm. 1994). Following the finding of "critical circumstances," no imports were made after early August 1993. *ITC Final Determination* at I–11. The Commission's parallel injury investigation found imports of nitromethane from the PRC did not materially injure or threaten with material injury the domestic nitromethane industry. *ITC Final Determination* at I–3.

Angus now contests the Commission's final determination, claiming that the four Commissioners[1] who reached the negative determinations have committed errors sufficient to warrant reversal and remand.

2. *Standard of Review:*

The court's role is to uphold the Commissioner's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). As the trier of fact, the Commission must assess the quality of the evidence and give such weight to the evidence as it believes is justified.

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[1] Commissioner Bragg did not participate in these proceedings. Commissioner Crawford filed a dissenting opinion. *ITC Final Determination* at I–3 n.2.

DISCUSSION

In its final antidumping and countervailing duty investigations, the Commission is required to determine whether

> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a) of this section.

19 U.S.C. § 1671d(b)(1) (1988) (countervailing duty); 19 U.S.C. § 1673d(b)(1) (1988) (antidumping). To determine material injury, subsection 1677(7) directs that:

> the Commission, in each case—
>
> (i) shall consider—
>
> (I) the volume of imports of the merchandise which is the subject of the investigation,
>
> (II) the effect of imports of that merchandise on prices in the United States for like products, and
>
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and
>
> (ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports * * *.
>
> [Further], the Commission shall explain its analysis of each factor considered under clause (i) and identify each factor considered under clause (ii) and explain in full its relevance to the determination.

19 U.S.C. § 1677(7)(B) (1988).

Angus argues that because of numerous errors in the Commission's final negative material injury and threat determinations, this matter should be remanded.

I. *Chairman Newquist and Commissioner Rohr's Finding of Robustness.*

Chairman Newquist and Commissioner Rohr, in their investigation, found the domestic industry's performance was "robust"—both before and after the ten-month shutdown of Angus's facility. The Commissioners based their decision on data demonstrating "increases in 1993 in the industry's share of U.S. apparent consumption, shipments, capacity utilization, and net sales, as well as the strong performance in production and profitability." *ITC Final Determination* at I–15 n.79. Chairman Newquist and Commissioner Rohr gave limited weight to a mechanical comparison of 1990 data to data from 1993, finding, as did Vice Chair-

man Watson and Commissioner Nuzum, that such a comparison would be improper. *Id.* at I–11.

Angus contests this finding. First, Angus argues that the Commission wrongly compared 1993 data—the first full year of production—with the two prior, but partial, years 1991 and 1992. Second, Angus challenges the Commission's methodology for analyzing the data upon which Chairman Newquist and Commissioner Rohr based their decision. Finally, Angus questions Chairman Newquist and Commissioner Rohr's finding of no material injury, because it was made without examining import volume, price effects, or impact.

A. *Period of Review:*

Angus claims that any finding of increased market share for domestic industries from 1991 or 1992 to 1993 would be a false conclusion because its plant was not in full production during 1991 and 1992. According to Angus, a simple comparison of before-explosion and after-explosion profit and return-on-investment data demonstrates a marked deterioration in the domestic industry's position. Angus claims that domestic industry shipments, capacity utilization, net sales, and domestic industry production have decreased from 1990 to 1993. Further, Angus argues the cessation of imports in August 1993 due to the susceptibility of the imports to antidumping duties exaggerated the domestic industry's market share and further inflated the false vitality of the industry. (Pl.'s Br. at 13–17.)

The court disagrees. Chairman Newquist and Commissioner Rohr concluded that a mechanical comparison of 1990 and 1993 data would "distort" its analysis both in view of the many "intervening factors" that occurred in the domestic industry during that period *ITC Final Determination* at I–11, and because the injury requirement mandates that the Commission find whether "an industry suffers *present* material injury," *Chaparral Steel Co. v. United States,* 901 F.2d 1097, 1104 (Fed. Cir. 1990). The Commission found there was a very different industry in 1993 involving an entirely different financial calculus than the one that existed in 1990. *ITC Final Determination* at I–11.

The departure from the industry of one of its two domestic producers—W.R. Grace & Co.—significantly changed market dynamics, rendering comparison of the 1990 data with the 1993 data aberrational. It is conceded that Grace's departure was based on a decision made well before imports had a significant presence in the United States market. *Id.* at I–9 to I–10. Grace decided to reorganize its line of business to concentrate on certain core activities, which did not include nitroparaffins. *Id.* The industry's strong performance in 1993 occurred despite Grace's departure. *Id.* at I–15 n.79. That departure left the industry with a single supplier for nitromethane in the U.S. market, which the Commission recognized significantly changed market dynamics. *Id.* at I–10. Purchasers of nitromethane had turned to Chinese imports as an alternative, supplemental source. *Id.*

Moreover, the explosion at the Angus facility disrupted domestic industry production during the period between 1990 and 1993, precluding comparison between those two years. As the Commission found, "measures of profitability based on 1993 total assets or changes in book value of property, plant, and equipment versus the same items for 1990 [were] not comparable" because of the changed asset base as a result of Angus's investments into the rebuilding of its plant after the explosion. *ITC Final Determination* at I–14 n.71. Angus's post-explosion operations involved production in a different plant with a different cost structure and assets; therefore, the Commission could not compare ratios of profitability, whether based on sales or assets for the two periods before and after the explosion. *Id.*

Further, Angus started importing nitromethane to fulfill its existing contracts and to maintain its captive production of downstream derivatives. (Pl.'s Br. at 9.) Angus's importation of nitromethane was an important element of competition affecting the industry.

The Commission took these unusual circumstances into account when formulating its determination, and its decision to focus on 1993 data and make only limited comparisons between 1990 and 1993 data fell well within its discretion. *Kenda Rubber Indus. Co. v. United States*, 10 CIT 120, 127, 630 F. Supp. 354, 359 (1986) (noting Commission has "discretion to examine a period that most reasonably allows it to determine" injury). Accordingly, the court finds that substantial evidence supports the Commission's de-emphasis of the mechanical comparison of 1990 to 1993 data.

B. *Profitability Analysis Methodology:*

Angus also attacks the Commission's profitability analysis. Angus contends the operating income data reported by the Commission is in large part unreliable, and does not lend support to a finding that Angus's profits were strong. (Pl.'s Br. at 18.) Angus attributes this to an arbitrary allocation of cost of goods sold as well as an arbitrary allocation of selling, general and administrative expenses. Angus contends that allocating costs for individual products such as nitromethane that are produced as part of a joint production process is not as reliable as determining costs for the production process as a whole. *Id.* at 18–19.

According to Angus, the Commission staff recognized the essential unreliability of its approach in the Prehearing Report. Angus argues the Prehearing Report found that an allocation based on the market value of individual products, rather than on their physical volumes, would be more suitable because of the large differences in value of each of the nitroparaffins produced by the joint production method. Due to these differences, Angus contends the volume allocation method results in profits substantially greater than those yielded by the market value method. *Id.* at 20–21;(Conf. Doc. 10, USITC Prehearing Staff Rep. at I–33 to I–34.)

Angus suggests two alternative methodologies. The first methodology, contribution analysis (also known as direct product profitability),

focuses on differences between a product's revenue and its direct costs, and would not be affected by changes in the asset base or cost structure. (Pl.'s Br. at 22–23.) Application of contribution analysis to Angus's nitromethane operation, according to Angus, demonstrates a decline in its financial performance. *Id.* at 23. Alternatively, Angus argues the Commission could have analyzed Angus's profitability on a per-unit basis—which Angus claims would have removed the "large year-to-year swings in business activity and provide[d] a stable basis of comparison." *Id.* at 24. Angus notes this alternative methodology, which was present in the Prehearing Report, (Conf. Doc. 10, USITC Prehearing Staff Rep. at I–37,) also demonstrates declining operating profit per unit, and would not support Chairman Newquist and Commissioner Rohr's finding of robustness, (Pl.'s Br. at 24).

The court finds the Commission's methodology of analyzing industry profitability reasonable. Subsections 1677(4)(D) and 1677(10), title 19, United States Code direct the Commission to make a profitability analysis specific to the product rather than to the product line when it has sufficient information to do so, as it did here. 19 U.S.C. § 1677(4)(D) (1988) (providing, in pertinent part, that "[t]he effect of subsidized or dumped imports shall be assessed in relation to the United States production of a like product if available data permit"); 19 U.S.C. § 1677(10) (1988) (defining "like product"); *see Hannibal Indus., Inc. v. United States,* 13 CIT 202, 710 F. Supp. 332 (1989) (requiring Commission to use data specific to like product rather than product line where "record contains sufficient information"). The Commissioners reviewed Grace's nitroparaffins operations as a whole because separate data on nitromethane was not available from Grace, and because nitroparaffins was the narrowest group of products that included the like product nitromethane. *ITC Final Determination* at I–13; *see* 19 U.S.C. § 1677(4)(D) (providing, in pertinent part, when data is not available to make product-specific analysis, the Commission shall assess "[t]he effect of the subsidized or dumped imports * * * by the examination of the production of the narrowest group or range of products, which contains a like product, for which the necessary information can be provided.") However, with regard to Angus, the Commission was able to make a profitability analysis specific to its product and did so. *ITC Final Determination* at I–13. Therefore, the Commission's actions were in accordance with the statutory mandate.

The Commission staff also presented the Commissioners with overall establishment data and nitroparaffin operation data. (Conf. Doc. 20, USITC Final Staff Rep. at I–33 to I–35, I–37 to I–40.) The Commission therefore had an opportunity to consider Angus's nitroparaffins operations as a whole, and to draw from that data a conclusion supported by substantial evidence. *Companhia Paulista de Ferro-Ligas v. United States,* 20 CIT ____, ____, Slip Op. 96–63 at 8 (Apr. 15, 1996) (finding "the Commission is presumed to have considered the entire record

absent evidence to the contrary"). The court finds the Commission's conclusions are supported by substantial evidence.

The Commission found accuracy problems with Angus's direct product profitability methodology. The Commission's final report found that many of the nitroalkanes were captively consumed. (Def. U.S. Int'l Trade Comm.'s Mem. in Opp'n to Pl.'s Mot. for J. on the Agency R. at 31 [hereinafter Def.'s Br.]; Conf. Doc. 20, Final Staff Rep. at I–39 to I–40.) Angus used the majority of the nitromethane it manufactured internally, in part because the "derivatives * * * have a much higher market value and volume of trade sales than the nitroparaffins, including nitromethane." (Def.'s Br. at 31; *see also* Conf. Doc. 20, Final Staff Rep. at I–39.) Valuation of the nitromethane under the direct product profitability methodology would have been difficult, therefore, because the downstream captive consumption involved internal transfers at cost resulting in the production of more valuable end products. Angus itself noted the difficulty in selecting the proper methodology, arguing "the result of either methodology is arbitrary. One generates a profit ratio which some would view as intuitively high and the other generates a profit ratio which some would regard as modest." (Pl.'s Reply Br. at 8.) In light of the advantages and disadvantages of both approaches, the Commission properly exercised its discretion by choosing among acceptable methodologies, and its choice is supported by substantial evidence. *See United States Steel Group v. United States*, 18 CIT 1190, 1218, 873 F. Supp. 673, 699 (1994) (providing "[i]t is within the agency's discretion to select a particular methodology, as long as the choice is supported by substantial evidence"), *aff'd*, No. 95–1245, –1257, –1306, –1307 (Fed. Cir. Aug. 29, 1996).

Angus's suggested contribution analysis method is therefore unpersuasive. According to Angus, contribution analysis is "applied by calculating the difference between the revenues generated by nitromethane sales, and the costs directly assignable to nitromethane production, *i.e.*, the raw materials cost of nitromethane." (Pl.'s Br. at 22–23.) Upon application of this methodology, Angus's own data demonstrate increasing revenue and material costs from 1991 to 1993. *Id.* at 23; (Pl.'s Mot. for J. on the Agency R. (Conf. Version) at 23, Table 4.) This increased revenue supports Chairman Newquist and Commissioner Rohr's finding of "robustness," while increased material costs suggests that a factor outside of imports was affecting the industry.

Moreover, as defendant points out, contribution analysis "is typically used in conjunction with an analysis of fixed costs to determine what a company's change in costs and operations will be when it decreases or increases the production of one co-product at the expense of other co-products," (Def.'s Br. at 33;) *see also Accountants' Handbook* 9.37–9.40 (Rufus Wixon and Walter G. Kell eds., 4th ed. 1963), not as Angus asserts, as a general indicator of profitability. Angus itself casts doubt on the applicability of this alternative methodology, noting that "[o]f course, a high contribution margin in itself [the factor Angus urges the

court to use as a judge of profitability] does not imply profitability." (Pl.'s Br. at 23, n.55.) Accordingly, the Commission acted reasonably in not adopting this particular analysis.

Finally, the Commission examined Angus's proposed alternative methodology, unit profitability analysis, which calculates revenues and costs on a unit basis. (Conf. Doc. 20, Final Staff Rep. at I–41, Table 10.) The Commission considered and found this methodology to be deficient, because it relied on total asset figures for 1990 and 1993 that were not comparable. *See id.* at I–42 to I–43. Substantial evidence supports the Commission's finding that the methodology would not have provided accurate results because of Angus's significant investments in its new plant.

C. *Impact of LTFV Imports on the Industry's Health:*

Chairman Newquist and Commissioner Rohr found that the domestic industry producing nitromethane was not experiencing material injury.

> In particular, they note[d] the robust performance of the domestic industry both before and following the ten-month shutdown of ANGUS's facility, as demonstrated by increases in 1993 in the industry's share of U.S. apparent consumption, shipments, capacity utilization, and net sales, as well as the strong performance in production and profitability.

ITC Final Determination at I–15 n.79. As Chairman Newquist and Commissioner Rohr determined that the domestic industry producing nitromethane was not experiencing material injury, they did not analyze whether there was material injury by reason of LTFV imports. *Id.* at I–15 n.80. Chairman Newquist and Commissioner Rohr's methodology is known as a two-step or bifurcated analysis. Under the two-step approach, a commissioner first assesses the state of the particular domestic industry. If the commissioner concludes that the industry is materially injured, the analysis then proceeds to a separate inquiry as to whether the relevant imports contribute in a non-*de minimis* way to that material injury. *United States Steel Group v. United States*, No. 95–1245, –1257, –1306, –1307, slip. op. at 19 (Fed. Cir. Aug. 29, 1996).

Angus claims Chairman Newquist and Commissioner Rohr failed to consider the industry's health in the context of the impact of the LTFV imports on the industry. According to Angus, the Commission must consider whether the industry is experiencing material injury, not whether the domestic industry is healthy. (Pl.'s Br. at 28.) Angus argues a healthy industry may still experience injury. *Id.* As Chairman Newquist and Commissioner Rohr merely found the domestic industry's performance to be robust, Angus contends they must have assumed that the domestic industry was not experiencing injury. *Id.* at 28–29.

According to Angus, this court in *Republic Steel Corp. v. United States*, 8 CIT 29, 591 F. Supp. 640 (1984) found that "health" or "robustness" alone is not the equivalent of an absence of material injury.

Observing that the Commission "should not be engaged in a determination of whether an industry is 'healthy[,]'" the court said:

> A 'healthy' industry can be experiencing injury from importations and an 'unhealthy' industry can be unaffected by importations. The purpose of the ITC's investigation is to determine whether imports are a cause of any effect on an industry which could amount to 'material injury.' This is the clear meaning of the detailed statutory instructions on the weighing of injury contained in 19 U.S.C. § 1677(7).

8 CIT at 39, 591 F. Supp. at 649.

Angus contends the detailed statutory instructions in subsection 1677(7) mandate that the Commissioners, in making their material injury determination, must consider the volume, price effects, and impact of the subject imports in each case to determine whether the domestic industry was experiencing material injury. This mandate, Angus argues, was reflected in the 1988 amendments to 19 U.S.C. § 1677(7), and their accompanying legislative history, Finance Comm., U.S. Senate, *Omnibus Trade Act of 1987*, S. Rep. No. 100-71, at 115–18 (1987). Congress amended subsection 1677(7) to direct that the Commission (1) shall evaluate import volume, price effects, and impact "in each case"; (2) may "consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports"; and (3) in every determination, shall explain its analysis of each of the three mandatory factors, and shall identify each discretionary factor, explaining in full its relevance to the determination. 19 U.S.C. § 1677(7) (1988).

Angus contends that Congress's purpose in amending the statute was that it wanted to ensure that the Commission consider, "in each case," the industry's health in the context of the impact of the imports, and in each case, explain its analysis of each of the three mandatory factors. According to Angus, Chairman Newquist and Commissioner Rohr's methodology fails to meet this mandate. (Pl.'s Br. at 30–34.)

Defendant contends Angus has misunderstood Chairman Newquist and Commissioner Rohr's actions. According to defendant, the Commission addressed a number of indicators in detail that disclosed no evidence of material injury, but rather indicated the contrary—that the industry was "robust" both before and after Angus's shutdown. (Def.'s Br. at 40–42;) *see ITC Final Determination* at I–8 to I–15 (finding, for instance, increases in production, hours worked by production and related workers, net sales values, and operating income during the period of investigation). According to defendant, therefore, Chairman Newquist and Commissioner Rohr were entitled to end their investigation at that point in the proceedings. (Def.'s Br. at 42–46.)

The Court of Appeals for the Federal Circuit (CAFC) has recognized that there exists a "complicated network of statutory tests that must or may be employed by each commissioner in deciding whether the causal effects of particular imports support imposition of countervailing or

antidumping duties." *United States Steel Group v. United States,* No. 95–1245, –1257, –1306, –1307, slip. op. at 22 (Fed. Cir. Aug. 29, 1996). The CAFC has further explained that the two-step methodology is consistent with statutory mandates. *Id.* At 21. Indeed, there is no indication in the legislative history of the 1988 amendments to 19 U.S.C. § 1677(7) that Congress intended for the long-standing two-step test to be replaced. Because Chairman Newquist and Commissioner Rohr found no material injury, there was no need to proceed to the second step of the inquiry. The court finds that such an application of the two-step analysis comports with relevant statutory mandates and is in accordance with law.

II. *Findings of Vice-Chairman Watson and Commissioner Nuzum:*

Vice Chairman Watson and Commissioner Nuzum independently considered whether the domestic industry was experiencing material injury by reason of LTFV imports, by examining the volume of LTFV imports, the price effects of those imports, and their impact on domestic producers. Upon review of these factors, Vice Chairman Watson and Commissioner Nuzum found there was no material injury by reason of the LTFV imports. *ITC Final Determination* at I–15 to I–24.

Angus contends the Commission failed (a) to consider that no imports would have occurred if they had been at prices not less than fair value and (b) to define the domestic industry throughout its analysis as including both Angus and Grace. (Pl.'s Br. at 35–63.)

A. *Volume of Imports:*

In examining the volume of imports of nitromethane into the United States, subsection 1677(7)(C) provides that the Commission "shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i) (1988).

Vice Chairman Watson and Commissioner Nuzum found the imported nitromethane market share had shrunk since 1991. During this period, the Commission also determined that Angus's market share had increased from 1990 to 1993. *ITC Final Determination* at I–16 to I–17.

In evaluating import volume, Vice Chairman Watson and Commissioner Nuzum considered Angus's production outage during 1991 and 1992 which resulted in a shortage of domestically-produced nitromethane. Because of this shortage, the Commissioners found an increased supply of imported nitromethane—almost entirely from China—was brought into the country. Angus imported much of this nitromethane, as Grace, the only other domestic producer of nitromethane, was unable to satisfy demand. As Angus returned to production, Angus began canceling import contracts (some nitromethane orders, however, could not be canceled), and the volume of imports significantly decreased. Further, Grace exited the nitromethane industry in 1992 for reasons unrelated to competition from LTFV imports. *Id.* Upon reviewing the data,

Vice Chairman Watson and Commissioner Nuzum did not consider the 1993 import levels problematic, characterizing such imports as "only an alternative, second source of supply for U.S. purchasers[.]" *Id.* at I–17.

Angus rejects these findings. First, Angus contends Vice-Chairman Watson and Commissioner Nuzum's use of 1991 as a base year for gauging subsequent changes in import volume or market share was irrational, as Angus's production was limited to only four months of that year. According to Angus, therefore, any increase in its market share would have been a natural result of Angus's return to full capacity. (Pl.'s Br. at 38.) Using 1990 as a base year, Angus argues that, in absolute and relative terms, there was a net increase in import volume between 1990 and 1993. This increase, according to Angus, was significant. *Id.* at 36.

Second, Angus claims Vice-Chairman Watson and Commissioner Nuzum myopically focused on Angus's market share, rather than on the share of the entire domestic industry between 1990 and 1993 as is mandated by statute. According to Angus, the appropriate definition of the entire domestic industry would include the facilities, equipment and workers used by Angus and Grace together. *Id.* at 38–39.

Third, Angus argues that imports cannot serve as an alternative source of supply for nitromethane purchasers, as "[t]he record shows incontrovertibly that when Chinese nitromethane is priced at not less than fair value, no U.S. purchaser will purchase it." *Id.* at 39–40 (arguing imports ceased in August 1993 because they became subject to antidumping duties of 233.7%). As a result, Angus contends, there is substantial evidence on the record that imports were displacing domestic industry sales, and therefore the Commissioners should have characterized the volume of those imports as significant. *Id.* at 40.

Defendant argues that increased volumes of imports were not "significant" because they were caused by specific market conditions not attributable to the effects of imports. (Def.'s Br. at 52–54.) The Commission evaluates import volume "in light of the 'conditions of trade, competition, and development regarding the industry concerned.'" *General Motors Corp. v. United States,* 17 CIT 697, 711, 827 F. Supp. 774, 787 (1993) (quoting Finance Comm., U.S. Senate, *Trade Agreements Act of 1979,* S. Rep. No. 96–249, at 88 (1979)). Some of the relevant "conditions of trade" included the explosion at the Angus plant, Grace's decision to exit the industry, and purchasers' interest in maintaining an alternative source of supply. (Def.'s Br. at 54.) According to the defendant, these factors, none of which were attributable to the effects of imports, caused significant changes in the market. Therefore, defendant argues, the Commission properly concluded that allegations of Angus's lost sales were not indicative of material injury. *Id.* at 55.

The explosion and Grace's exit from the industry created a new demand for imported nitromethane. Due to the interruption to Angus's production in 1991 and 1992, there was a shortage of domestically produced nitromethane, as Grace was unable to satisfy demand. *Id.; ITC Final Determination* at I–16. When Angus resumed production, defen-

dant argues, it regained its previous market share, plus a portion of the market share formerly held by Grace. Angus's market share was therefore higher in 1993 than in 1990, before the plant explosion and before imports entered the United States in substantial quantities. (Def.'s Br. at 55–56;) *ITC Final Determination* at I–16.

Purchasers after 1992 demonstrated a continued interest in using imports as an alternative or second source of supply. Vice-Chairman Watson and Commissioner Nuzum reported purchasers' concerns about "a repetition of the supply disruption that ensued after ANGUS's plant explosion." *ITC Final Determination* at I–17. These concerns were grounded in fact. According to Vice-Chairman Watson and Commissioner Nuzum's findings, the effects of the Angus shutdown were tremendous. The Commissioners found that some purchasers had to shut down, while others reduced production or reduced the nitromethane component in their products as a way of conserving the limited supplies of nitromethane available. *Id.* at I–17 n.93, I–21; *cf. Gifford-Hill Cement Co. v. United States,* 9 CIT 357, 368–69, 615 F. Supp. 577, 586 (1985) (finding desire for secondary supply source as reason for not regarding alleged lost sale as injurious).

Defendant discounts Angus's contention that imports decreased as a result of the suspension of liquidation of the LTFV imports, arguing the Commission accorded greater weight to the evidence showing imports decreasing just after Angus resumed production, even before suspension of liquidation. (Def.'s Br. at 57.) Defendant argues the Commissioners were entirely reasonable in not concluding that the decline was an effect of suspension of liquidation. Defendant contends, from these arguments, that Angus failed to satisfy its burden of showing that Vice-Chairman Watson and Commissioner Nuzum's conclusions were unreasonable. *Id.* at 57–58.

Vice Chairman Watson and Commissioner Nuzum were reasonable in their use of 1991 as a base year for judging changes in market share and import volume. The Commissioners recognized that the commencement of the importation of nitromethane was in large part due to Angus's orders which accounted for large shares of the Chinese nitromethane imports in 1991 and 1992. *ITC Final Determination* at I–16; *(see also* Conf. Doc. 20, Final Staff Rep. at I–53 n.96) (providing exact percentage figures). Angus conceded that it turned to imports from China became "neither Grace nor sources in other countries had the capacity to satisfy [its] demands." *ITC Final Determination* at I–8 n.22.

For the Commission to best judge the volume of the nitromethane imports, it must start its analysis from 1991, the year when the items were being imported into the U.S. by domestic producers, and judge subsequent change from that perspective. Angus's plant was not operational throughout 1991; therefore the initial increase in imports was not due to LTFV sales, but rather because of a decrease in the domestic supply. Moreover, Angus itself fueled the commencement of imports because of its inability to meet contractual obligations through its own

production. This forced Angus to import nitromethane and to cancel supply contracts with a number of U.S. purchasers of nitromethane. *ITC Final Determination* at II–23 & n.106; *(see also* Conf. Doc. 20, Final Staff Rep. at I–62 & n.110) (noting quantities of nitromethane Angus was unable to deliver). The domestic market had significantly changed. As this change was not attributable to imports, substantial evidence supports the Commission's decision not to focus its investigation on import gains from 1990 to 1991.

The court also finds that the Commissioners did not myopically focus on Angus rather than the domestic industry and all its facilities and equipment utilized between 1990 and 1993. As noted earlier, the Commission concluded a direct comparison of industry figures from 1990 and 1993 would have been improper, due to fundamental, structural changes in the nitromethane market. *ITC Final Determination* at I–11. This finding is supported by substantial evidence.

The court furthermore disagrees that Vice Chairman Watson and Commissioner Nuzum erred in not finding that imports ceased solely in the face of antidumping duties. Angus claims the cessation of imports reveals that imports can only be sold at LTFV and are not a viable alternative supply at a fair value price. (Pl.'s Br. at 40.) The Commission recognized that imports ceased in August 1993, stating "the pending LTFV determination likely contributed to the cessation of Chinese imports." *ITC Final Determination* at I–11 n.45. However, the fact that imports ceased does not necessarily lead to Angus's preferred reading of the data—*i.e.,* that imports were not a viable alternative source—because the Commissioners identified other key factors which influenced the decline of substitute imports into the United States. The Commission found that Angus's imports of nitromethane during its production outage constituted a large share of total imports. *Id.* at I–16. As Angus's production gradually came back on line beginning in March 1992, Angus began canceling its own import contracts, contributing to a considerable subsequent drop in import volumes. *Id.* The Commission noted that testimony at their hearings revealed that *"ANGUS's decision to cancel existing contracts* for Chinese nitromethane when its production facilities were coming back on line, just as the Chinese were attempting to fulfill their obligations under those contracts, have *made the Chinese reluctant to participate in the U.S. market." Id.* at I–25 to I–26 (emphasis added). Angus had furthermore sent notice to U.S. purchasers and to one Chinese company that Angus intended to enforce its patent rights which, Angus alleged, the particular Chinese company was violating. Such notice effectively eliminated at least one Chinese company's supply from the U.S. market. *Id.* at I–26 n.160. In light of the variety of factors the Commission identified as contributing to the cessation of imports, the court disagrees with Angus's contention that the Commission erred in not finding that imports ceased solely in the face of antidumping duties, and further finds substantial evidence sup-

ports the Commission's finding that imports were a viable alternative source to U.S. nitromethane.

B. *Price Effects of the LTFV Imports:*

In evaluating the effect of LTFV imports on prices, the Commission found that, although prices dropped, the decline was "due to unique market conditions existing in mid–1992 when Angus * * * tried to recapture market share." *ITC Final Determination* at I–18. According to the Commission,

> [t]he oversupply situation that led to the price declines in the U.S. market was in large part the result of ANGUS's reentry into the market months ahead of schedule * * *. ANGUS priced its [inventories of Chinese nitromethane] below the prices other importers were offering in order to win these customers, and be in a position to continue to supply subsequently from its domestic production.

Id. at I–19.

The Commission further determined "ANGUS's increased market share, high net sales, high profitability, high operating income—particularly as a percentage of net sales—and significant production" did not support a finding that imports adversely affected the domestic price for nitromethane. *Id.* at I–21. As evidence of the absence of significant adverse price effects caused by LTFV imports, the Commission noted that Angus was operating "under forward contracts for 1994 that it negotiated at high prices with its chloropicrin customers, and in all major markets for nitromethane, ANGUS's nitromethane was priced the same or higher for 1994 than during 1993." *Id.* (footnote omitted).

Angus claims the antidumping laws were designed to prevent situations in which domestic manufacturers must choose between losing sales and lowering their prices to match an unfair price. (Pl.'s Br. at 44.) If the nitromethane imports had not been sold at less than fair value, Angus claims, it would not have had to lower its price substantially to compete. Thus, Angus distinguishes the situation at hand from the situation where two domestic producers are in price competition. Angus argues competition with foreign producers who are underselling with LTFV imports is the exact situation which Congress wished to avoid. *Id.* at 43–44.

Angus further contends it was only able to make forward contracts at high prices once the LTFV imports had stopped. This, according to Angus, would suggest the imports did have an adverse price effect. *Id.* at 44–45. Moreover, Angus argues the finding that Angus was the price leader in lowering the domestic market price is erroneous. *Id.* at 55–58. Angus contends the Commission failed to make price comparisons for the relevant period the Commission was investigating. Once the relevant data is isolated, according to Angus, it demonstrates price leadership by the Chinese, not by the domestic manufacturers. *Id.* at 57. Angus contends the appropriate period of investigation is limited to "the last three quarters of 1992." *Id.* at 45.

The court finds substantial evidence supports the Commission's findings that imports were not price suppressing and that Angus, rather than imports, fueled the price declines. The Commission observed that "ANGUS's imported nitromethane was initially priced 20 to 50 percent below other imported Chinese nitromethane." *ITC Final Determination* at I–19. Grace, the other domestic producer of nitromethane, "reported difficulty only in competing on price with Angus—not with subject imports." *Id.* at I–22. The Commission further found prices stabilized in the market after the structural changes that occurred in 1991 and 1992, *id.* at I–20, and that domestic industry performance indicators showed no signs of adverse price effects, *id.* at I–21. Indeed, in some end-use markets, the Commission found the prices for nitromethane were relatively stable throughout the period of investigation. *Id.* at I–21.

The Commission also specifically cited higher quality and shorter lead times for acquisition of the domestic product, *id.* at I–20, and captive consumption of significant amounts of nitromethane, *id.* at I–21, as factors limiting adverse price effects. Thus, the Commission concluded Angus did not have to match the import prices to be competitive with Chinese nitromethane producers as purchasers would "likely pay more for the quality and delivery terms [that Angus could] offer, thereby reducing purchasers' handling, inventory, and related production costs." *Id.* at 35 n.117. Because the Commission's conclusion that Angus was the industry price leader is supported by substantial evidence, the court disagrees with Angus's claim that its ability to command high prices after imports had stopped necessarily shows that imports were price-suppressing.

C. *Impact of LTFV Imports on Domestic Production:*

According to Angus, the Commission wrongfully compared the domestic industry's 1993 market share—consisting only of Angus—with the market share of only part of the domestic industry in 1990—when the entire domestic industry consisted of both Angus and Grace. (Pl.'s Br. at 59–60.) Angus argues that, even though its own market share actually increased, the share held by the domestic industry as a whole shrank. *Id.* at 60. Thus, Angus argues, the Commission failed to evaluate "actual and potential decline in * * * market share" as directed by statute. 19 U.S.C. § 1677(7)(C)(iii) (1988). The court disagrees. As noted earlier, a mechanical comparison of 1990 and 1993 data would lead to a distorted analysis. The Commission's choice of industry data was supported by substantial evidence.

Angus further argues the Commission failed to consider the allegation that if imports were not sold at LTFV, there would be no imports at all. (Pl.'s Br. at 61.) Angus claims this theory is supported by record evidence, namely that imports of Chinese nitromethane ceased because of antidumping duties of 233.7 percent. *Id.* As discussed earlier, there is substantial evidence on the record revealing that imports ceased for reasons other than the announcement of antidumping duties. The Commission noted that there were other factors leading to the decline in

imports, including an intellectual property dispute, *ITC Final Determination* at I–26, and Angus's cancellations of its own import contracts which accounted for a sizeable share of imports, *id.* at I–16.

The Commission found no significant adverse effect in assessing the impact of LTFV imports on Angus. The Commission found Angus's ability to recapture its 1990 market share after the plant explosion and to increase that market share in 1993 was evidence that Chinese nitromethane imports did not adversely impact the domestic market. *ITC Final Determination* at I–24. The Commission's conclusions are supported by substantial evidence on the record.

III. *Finding of No Threat of Material Injury:*

Angus contends the Commission's finding that there was no threat of material injury from LTFV imports is flawed in two respects: (1) the Commission misconstrued industry data from 1991 and 1993, and (2) the Commission failed to recognize that LTFV imports suppressed prices, because Angus could only increase prices after imports had ceased. (Pl.'s Br. at 64–65.) Because of these analytical flaws, Angus contends "the Commissioners appear to have forgotten their statutory role, which is to determine whether a domestic industry * * * is materially injured or threatened with material injury by reason of LTFV imports." *Id.* at 65–66.

The court disagrees that the Commission erred in its threat analysis. Angus's arguments essentially rely upon the same points raised in protest of the Commission's finding that there was no material injury by reason of LTFV imports. As explained earlier, the court finds the Commission's choice of 1991 and 1993 industry data is supported by substantial evidence. Furthermore, the Commission's finding that significant adverse price effects were not likely is supported by substantial evidence. The Commission was fully cognizant that imports had ceased in August 1993, but did not reach the conclusion that the suspension of liquidation was responsible for the price increases in late 1993 and 1994. The Commission found that, prior to the suspension of liquidation, decreases in domestic prices for nitromethane "occurred as a result of ANGUS selling off its considerable inventories" of imports after its own production came back on line. *ITC Final Determination* at I–26. The Commission also noted Angus's selling price for Chinese nitromethane was lower than other importers' selling price. The Commission found this indicated any future price effects were not likely to be negative. *Id.* The Commission additionally noted that Angus had entered into forward contracts for 1994, which were at high prices and contained penalty clauses for customers' release from the contracts. Indeed, the Commission found Angus's nitromethane was priced the same or higher for 1994 than for 1993. *Id.* Substantial evidence therefore supports the Commission's finding that it is unlikely that subject imports will enter the U.S. at prices having an adverse effect on domestic prices. Substantial evidence also supports the Commission's determina-

tion that there is no threat of material injury by reason of LTFV imports from China.

CONCLUSION

A careful review of the record demonstrates that substantial evidence supports the determination of the International Trade Commission. Although the data might be subject to other interpretations, the court will not weigh one potential theory against another. That is the responsibility of the Commission. Accordingly, the determination of the International Trade Commission is sustained.

(Slip Op. 96–170)

CEMEX, S.A., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT AND NATIONAL CEMENT CO. OF CALIFORNIA, DEFENDANT-INTERVENORS

Consolidated Court No. 93–10–00659

(Dated October 24, 1996)

JUDGMENT

RESTANI, *Judge:* The court hereby sustains the results of the second remand in this challenge to the antidumping duty administrative review determination in *Gray Portland Cement and Clinker from Mexico,* 58 Fed. Reg. 47,253 (Dep't Comm. 1993) (final results admin. rev.). This court's decisions in *CEMEX, S.A. v. United States,* Slip Op. 95–72 (Apr. 24, 1995) (first remand order), and *CEMEX, S.A. v. United States,* Slip Op. 96–132 (Aug. 13, 1996) (second remand order), are hereby incorporated by reference.

CEMEX preserves its previous challenges and asserts a new challenge to Commerce's freight methodology. That methodology is upheld for the reasons stated in the second remand determination, specifically Commerce's determination that CEMEX did not establish that its allocation between freight for Type I cement and all others (including non-subject merchandise) was non-distortive.

The court also finds that Commerce's assessment rate methodology was non-distortive and that the cash deposit rate issue is moot. The court also finds that error correction was within a reasonable degree of even-handedness within this review. Programming errors are particularly susceptible to correction without administrative disruption.

(Slip Op. 96–171)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE S.A., SKF GMBH, SKF INDUSTRIE, S.P.A., SKF (U.K.) LTD., SKF SVERIGE AB, RHP BEARINGS, RHP BEARINGS INC., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., GMN GEORG MULLER NURNBERG AG, NSK LTD., NSK CORP., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, NMB THAI LTD., PELMEC INDUSTRIES LTD., NMB CORP., FAG KUGELFISCHER GEORG SCHÄFER KGAA, FAG CUSCINETTI S.P.A., FAG (UK) LTD., BARDEN CORP. (UK) LTD., FAG BEARINGS CORP., BARDEN CORP., PEER BEARING CO., INA WALZLAGER SCHAEFFLER KG, AND INA BEARING CO., INC., DEFENDANT-INTERVENORS

Consolidated Court No. 92–07–00483

(Dated October 25, 1996)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Results of Redetermination Pursuant to Court Remand, *Torrington Co. v. United States,* 20 CIT ____, 926 F. Supp. 1151 (1996) ("Remand Results"), and Commerce having complied with the Court's Remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on July 1, 1996 are affirmed in their entirety; and it is further

ORDERED that, as all other issues have been decided, this case is dismissed.

(Slip Op. 96–172)

FEDERAL-MOGUL CORP., PLAINTIFF, AND TORRINGTON CO., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF FRANCE S.A., SKF GMBH, SKF INDUSTRIE, S.P.A., SKF (U.K.) LTD., SKF SVERIGE AB, FAG KUGELFISCHER GEORG SCHÄFER KGAA, FAG CUSCINETTI S.P.A., FAG (UK) LTD., BARDEN CORP. (UK) LTD., FAG BEARINGS CORP., BARDEN CORP., BARDEN PRECISION BEARINGS CORP., RHP BEARINGS AND RHP BEARINGS INC., PEER BEARING CO., KOYO SEIKO CO., LTD., KOYO CORP. OF U.S.A., NSK LTD., NSK CORP., SNR ROULEMENTS, NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., AND NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, DEFENDANT-INTERVENORS

Consolidated Court No. 92–06–00422

(Dated October 25, 1996)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Results of Redetermination Pursuant to Court Remand, *Torrington Co. v. United States,* 20 CIT ____, 924 F. Supp. 210 (1996) ("Remand Results"), and Commerce having complied with the Court's Remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

Ordered that the Remand Results filed by Commerce on July 10, 1996 are affirmed in their entirety; and it is further

Ordered that, as all other issues have been decided, this case is dismissed.

(Slip Op. 96–173)

KOYO SEIKO CO., LTD. AND KOYO CORP. OF U.S.A., PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE, DEFENDANTS, AND TIMKEN CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–12–00795

(Dated October 25, 1996)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Results of Redetermination Pursuant

to Court Remand, *Koyo Seiko Co., Ltd. v. United States,* 20 CIT ____, 932 F. Supp. 1488 (1996) ("Remand Results"), and Commerce having complied with the Court's Remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on August 12, 1996 are affirmed in their entirety; and it is further

ORDERED that, as all other issues have been decided, this case is dismissed.

(Slip Op. 96–174)

NSK LTD. AND NSK CORP., PLAINTIFFS *v.*
UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR

Consolidated Court No. 93–12–00830

(Dated October 25, 1996)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") Results of Redetermination Pursuant to Court Remand, *NSK Ltd. v. United States,* 20 CIT ____, 919 F. Supp. 442 (1996) ("Remand Results"), and Commerce having complied with the Court's Remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on June 18, 1996 are affirmed in their entirety; and it is further

ORDERED that, as all other issues have been decided, this case is dismissed.

(Slip Op. 96–175)

COATS & CLARK, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–01–00082

[Defendant's motion to dismiss granted]

(Decided October 28, 1996)

Neville, Peterson & Williams for plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office; *James A. Curley,* Civil Division, Dept. of Justice, Commercial Litigation Branch.

MEMORANDUM OPINION AND ORDER

POGUE, *Judge:* This case is before the court on defendant's motion to dismiss pursuant to USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and (5) failure to state a claim on which relief can be granted. The plaintiff has not responded to defendant's motion.

The plaintiff imported sewing thread, which was liquidated under HTSUS subheading 5509.22.00.10 on May 20, 1994. The plaintiff filed a protest against the liquidation on August 19, 1994, which was denied on August 24, 1994, as untimely.

The plaintiff alleges in paragraph 1 of the complaint that the trial court has jurisdiction under 28 U.S.C. §1581(a), which provides as follows:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

A protest, however, must be filed with Customs within 90 days after notice of liquidation. 19 U.S.C. §1514(c)(2) (Supp. 1993). The plaintiff's protest here was filed on August 19, 1994, which was 91 days after liquidation.

When a timely protest is not filed, the liquidation decision became final. 19 U.S.C. §1514(a) ("* * * decisions of the appropriate customs officer * * * shall be final and conclusive unless a protest is filed in accordance with this section* * *"). In the absence of a timely protest, the Court lacks jurisdiction under § 1581(a). *New Zealand Lamb Co. v. United States,* 40 F.3d 377, 380 (Fed. Cir. 1994); *Hambro Automotive Corp. v. United States,* 603 F.2d 850, 853 (CCPA 1979); *Everflora Miami, Inc. v. United States,* 19 CIT ____, 885 F. Supp. 243, 246 (1995), *aff'd* without published opinion, 86 F.3d 1174 (Fed. Cir. 1996).

Accordingly, the action will be dismissed.

(Slip Op. 96–176)

FORMER EMPLOYEES OF PENN VIRGINIA OIL AND GAS CORP, PLAINTIFFS *v.* ROBERT B. REICH, SECRETARY OF LABOR, DEFENDANT

Court No. 96–06–01612

(Dated October 30, 1996)

ORDER

MUSGRAVE, *Judge:* Upon consideration of defendant's unopposed motion for remand, it is hereby

ORDERED that defendant's motion for remand is granted; and it is further

ORDERED that this action is remanded to the Department of Labor so that it may consider plaintiffs' request for reconsideration of Labor Department's Negative Determination Regarding Eligibility to Apply for Workers Adjustment Assistance for employees who were separated from Penn Virginia Oil and Gas Corporation located in the State of Tennessee under 19 U.S.C. § 2271–2322; and it is further

ORDERED that:

1. Within 30 days after entry of this order, the Department of Labor will (a) consider plaintiffs' request for reconsideration, (b) prepare its determination on reconsideration, (c) file with the Court the determination on reconsideration and the administrative record; and (d) serve a copy of the determination on reconsideration and a copy of the public portion of the administrative record upon Melissa McMahan; and

2. Within 20 days from receipt of notification that the Department of Labor has transmitted the report of its reconsideration to the Court and to Melissa McMahan, Melissa McMahan will advise the Court whether she is satisfied or dissatisfied with the Labor Department's determination on reconsideration, indicating the areas of dissatisfaction, if any, and whether she intends to proceed with this action; and

3. Upon receipt of notification of any dissatisfaction with the Department of Labor's determination on reconsideration and intent to proceed with this action, the Court will provide for an appropriate briefing schedule.

(Slip Op. 96–177)

FAG U.K. LTD., BARDEN CORP. (U.K.) LTD., BARDEN CORP., FAG BEARINGS CORP., NSK-RHP EUROPE LTD., AND RHP BEARINGS LTD., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TORRINGTON CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 95–03–00335–S1

Plaintiffs and defendant-intervenors, FAG U.K. Ltd., The Barden Corporation (U.K.) Ltd., The Barden Corporation and FAG Bearings Corporation (collectively "FAG"), move pursuant to Rule 56.2 of the Rules of this Court for judgment upon the agency record. FAG alleges that the Department of Commerce, International Trade Administration ("Commerce"), erred in: (1) employing a rate-based, rather than amount-based, adjustment for value-added taxes; and (2) including sales of sample and prototype merchandise to U.S. customers in its margin calculation.

Plaintiffs and defendant-intervenors, NSK-RHP Europe Ltd. and RHP Bearings Ltd. (collectively "NSK-RHP"), also move pursuant to Rule 56.2 for judgment upon the agency record. NSK-RHP claims that Commerce's computer program: (1) improperly converted insurance costs to dollars in cases in which U.S. sales are already valued in dollars; (2) incorrectly applied value-added tax to the HEDGE value twice; and (3) improperly double counted the value for domestic inland freight for 1993 purchase price transactions involving the Aerospace Division of RHP.

Defendant-intervenor and plaintiff, The Torrington Company ("Torrington"), also moves pursuant to Rule 56.2 for judgment upon the agency record. Torrington claims that Commerce erred in: (1) taking sales below cost into account in calculating profit for constructed value; (2) resorting to constructed value where sales are made below cost without first determining whether there were other similar models which could serve as price-based comparisons; (3) adjusting foreign market value for pre-sale inland freight; (4) utilizing RHP's allocations of inventory write-offs and write-downs to all sales where record evidence established that the adjustments were product-specific or product-line specific; (5) failing to examine whether Barden's sales were made below cost despite examining whether FAG sales were below cost, while record evidence established that the companies were related and were treated by Commerce as a single entity for virtually every other purpose of the review; and (6) making clerical errors.

Held: Plaintiff and defendant-intervenor FAG's motion for judgment on the agency record is granted in part and denied in part. Plaintiff and defendant-intervenor NSK-RHP's motion for judgment on the agency record is granted in part and denied in part. Defendant-intervenor and plaintiff Torrington's motion is granted in part and denied in part. This case is remanded to Commerce to: (1) utilize the approved tax-neutral methodology for adjusting for value-added taxes; (2) correct the clerical error of the conversion of insurance costs to dollars in cases in which the U.S. sales were already valued in dollars; (3) correct the clerical error in the application of value-added tax to the HEDGE value; and (4) correct the clerical error with respect to FAG/Barden U.S. sales.

[Plaintiff and defendant-intervenor FAG's motion for judgment on the agency record is granted in part and denied in part; plaintiff and defendant-intervenor NSK-RHP's motion for judgment on the agency record is granted in part and denied in part; defendant-intervenor and plaintiff Torrington's motion is granted in part and denied in part.]

(Dated November 1, 1996)

Grunfeld, Desiderio, Lebowitz & Silverman LLP, (Max F. Schutzman and *Andrew B. Schroth)* for plaintiff and defendant-intervenor FAG.

Covington & Burling (Harvey M. Applebaum, David R. Grace and *Mark F. Kightlinger)* for plaintiff and defendant-intervenor NSK-RHP.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *Mark A. Barnett, Michelle K. Behaylo, Stacy J. Ettinger, Thomas H. Fine, Dean A.*

Pinkert and *David J. Ross*, Attorney-Advisers, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Stewart and Stewart (Terence P. Stewart and *Wesley K. Caine)* for defendant-intervenor and plaintiff Torrington.

OPINION

TSOUCALAS, *Judge:* Plaintiffs and defendant-intervenors FAG U.K. Ltd., The Barden Corporation (U.K.) Ltd., The Barden Corporation and FAG Bearings Corporation (collectively "FAG") and plaintiffs and defendant-intervenors NSK-RHP Europe Ltd. and RHP Bearings Ltd. (collectively "NSK-RHP")[1] commenced this action challenging aspects of the Final Results of the fourth antidumping administrative review of the antidumping duty orders, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders ("Final Results")*, 60 Fed. Reg. 10,900 (1995), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France; Amendment to Final Results of Antidumping Duty Administrative Reviews and Recision of Partial Revocation of Antidumping Duty Order ("Amended Final Results")*, 60 Fed. Reg. 16,608 (1995). Defendant-intervenor and plaintiff, The Torrington Company ("Torrington"), also challenges aspects of the fourth review.

BACKGROUND

The administrative review at issue was conducted by the Department of Commerce, International Trade Administration ("Commerce"), pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (1992), and concerns antifriction bearing ("AFB") imports entered during the fourth review period, from May 1, 1992 through April 30, 1993. *Final Results*, 60 Fed. Reg. at 10,901.

On February 28, 1994, Commerce published the preliminary results of the fourth administrative review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, Thailand, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Notice of Intent To Revoke Order (in Part)*, 59 Fed. Reg. 9,463 (1994). On February 28, 1995, Commerce published the Final Results at issue. *See Final Results*, 60 Fed. Reg. 10,900. After correcting the calculation of U.S. price ("USP"), Commerce published its Amended Final Results on March 31, 1995. *Amended Final Results*, 60 Fed. Reg. 16,608.

On September 13, 1995, the Court consolidated *FAG U.K. Ltd., Barden Corp. (U.K.) Ltd., The Barden Corp. and FAG Bearings Corp. v. United States*, Court No. 95–03–00335–S1, *NSK-RHP Europe, Ltd. and RHP Bearings Ltd. v. United States*, Court No. 95–04–00372 and *Tor-*

[1] RHP Bearings was a United Kingdom corporation, engaged primarily in the manufacture of AFBs, that participated as an interested party to the fourth administrative review. As a result of a merger on January 1, 1994, RHP Bearings ceased to exist. NSK-RHP Europe Ltd. and RHP Bearings Ltd. became the corporate successors to RHP Bearings.

rington Co. v. United States, Court No. 95–03–00349, into this action, Consolidated Court No. 95–03–00335–S1. Pursuant to Rule 56.2 of the Rules of this Court, FAG, NSK-RHP and Torrington move for judgment on the agency record.

FAG contends that Commerce erred in: (1) employing a rate-based, rather than amount-based, adjustment for value-added taxes; and (2) including sales of sample and prototype merchandise to U.S. customers in its margin calculation.

NSK-RHP claims that Commerce's SAS computer program: (1) improperly converted insurance costs to dollars in cases in which U.S. sales were already valued in dollars; (2) incorrectly applied value-added tax ("VAT") to the HEDGE value twice; and (3) improperly double counted the value for domestic inland freight for 1993 purchase price transactions involving the Aerospace Division of RHP.

Torrington alleges that the following actions by Commerce were unsupported by substantial evidence on the agency record and not in accordance with law: (1) taking sales below cost into account in calculating profit for constructed value; (2) resorting to constructed value where sales were made below cost without first determining whether there were other similar models that could serve as price-based comparisons; (3) adjusting foreign market value for pre-sale inland freight; (4) utilizing RHP's allocations of inventory write-offs and write-downs to all sales where record evidence established that the adjustments were product-specific or product-line specific; (5) failing to examine whether Barden's sales were made below cost despite examining whether FAG sales were made below cost, while the companies were related and were treated by Commerce as a single entity for virtually every other purpose of the review; and (6) making clerical errors.

DISCUSSION

The Court has jurisdiction over this matter under 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

The Court must uphold Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Timken Co. v. United States,* 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), *aff'd,* 894 F.2d 385 (Fed. Cir. 1990).

1. *Commerce's VAT Adjustment Methodology:*

FAG challenges the VAT adjustment methodology that Commerce applied in the fourth review, arguing that Commerce should adopt a tax-neutral methodology which adds to USP the absolute amount, as

opposed to the *ad valorem* rate, of VAT collected on the relevant home market sale. FAG's Mem. Supp. Mot. J. Agency R. at 7–10.

Torrington claims that, while a remand is appropriate for Commerce to review its methodology, the Court should not direct Commerce to employ a specific methodology. Torrington's Opp'n to FAG's Mot. J. Agency R. at 6–7.

Commerce has decided to return to the tax-neutral methodology that the United States Court of Appeals for the Federal Circuit ("CAFC") held was a reasonable statutory interpretation in *Federal-Mogul v. United States*, 63 F.3d 1572 (Fed. Cir. 1995), and consents to a remand for this purpose. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 11; *see also Torrington Co. v. United States*, 20 CIT ____, ____, Slip Op. 96–163, at 16 (Oct. 3, 1996) (Commerce similarly consented to, and the Court granted, a remand for the same purpose). Hence, in accordance with *Federal-Mogul*, Commerce is required upon remand to implement the approved tax-neutral methodology in recalculating the adjustment to USP for FAG's dumping margins.

2. *Inclusion of Sales to U.S. Customers of Sample and Prototype Merchandise in Margin Calculations:*

FAG contends that Commerce improperly included zero-priced or *de minimis* U.S. sales of sample and prototype merchandise in its margin calculation of USP. FAG's Mem. Supp. Mot. J. Agency R. at 11–18. FAG argues that such sales are atypical of those made in the ordinary course of business in the U.S. and, if included, unfairly distort the measure of actual dumping. *Id.* at 13–16.

In the alternative, FAG claims that if sample and prototype sales are included in Commerce's margin calculations, a circumstance of the sale ("COS") adjustment should be made to foreign market value ("FMV") to account for the inclusion of the distortive sales. *Id.* at 16–18.

Commerce responds that, although in certain circumstances it may conclude that a U.S. sample is not a sale and thus exclude it from a margin analysis, Commerce is not required to exclude zero-priced or *de minimis* sales from its analysis. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 12–24. Further, Commerce asserts that a COS adjustment is unnecessary where there is merely a difference in prices charged. *Id.* at 24–26. Torrington agrees generally with the positions taken by Commerce. Torrington's Opp'n to FAG's and NSK-RHP's Mots. J. Agency R. at 7–15.

FAG's claim is without merit. First, Commerce is not required by statute or regulation to exclude zero-priced or *de minimis* sales from its analysis. Indeed, unlike the definition of FMV, the definition of USP contains no requirement that the prices used in USP calculations be the prices charged "in the ordinary course of trade." *Compare* 19 U.S.C. § 1677a *with* 1677b(a)(1)(A) (1988); *see also Floral Trade Council of Davis, Cal. v. United States*, 15 CIT 497, 508 n.18, 775 F. Supp. 1492, 1503 n.18 (1991) (regular exclusion of sales not in the ordinary course of trade only occurs on the home-market side of the price comparison);

Ipsco v. United States, 12 CIT 384, 394, 687 F. Supp. 633, 641 (1988) ("[I]f Congress intended to require the administering authority to exclude all sales made outside the 'ordinary course of trade' from its determination of United States price it could have provided for such an exclusion in the definition of United States price, as it has in the definition of foreign market value. It has not done so.").

Second, in determining antidumping duties, the statutory scheme compels Commerce to ascertain the USP of *"each entry* of merchandise subject to the antidumping duty order and included within that determination * * *." 19 U.S.C. § 1675(a)(2)(A) (1988) (emphasis added). This Court has acknowledged in dicta that the statute does not require that absolutely every U.S. sale of merchandise under investigation be included in every case. *See American Permac, Inc. v. United States,* 16 CIT 41, 44, 783 F. Supp. 1421, 1424 (1992) ("[t]he court has a difficult time reading the 'each entry' language [in 19 U.S.C. § 1675(a)(2)] to compel inclusion of all sales, no matter how distorting or unrepresentative"). However, Commerce can only exclude sales from USP in an administrative review in exceptional circumstances when those sales are unrepresentative and extremely distortive.[2] *See, e.g., Chang Tieh Indus. Co. v. United States,* 17 CIT 1314, 1318–19, 840 F. Supp. 141, 145–46 (1993) (exclusion of sales may be necessary to prevent a fraud on Commerce's proceedings).

In *Ipsco v. United States,* 13 CIT 402, 408, 714 F. Supp. 1211, 1217 (1989), the Court stated that sales should be excluded only "in those limited situations in which ITA finds that inclusion of certain sales which are clearly atypical would undermine the fairness of the comparison of foreign and U.S. sales." (Citation omitted). In essence, a sale is excluded only when its inclusion would lead to an unrepresentative price comparison, thus frustrating the "apples to apples" comparison goal of the antidumping laws. *See id.; see also U.H.F.C. Co. v. United States,* 916 F.2d 689, 697 (Fed. Cir. 1990); *Smith-Corona Group v. United States,* 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied,* 465 U.S. 1022 (1984) ("[o]ne of the goals of [determining USP under 19 U.S.C. § 1677a] is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples"). The *Ipsco* court further noted that the "unrepresentative" standard for excluding sales from USP is stricter than the "outside the ordinary course of trade" standard used in the FMV calculation. *Ipsco,* 13 CIT at 409, 714 F. Supp. at 1217.

Finally, for Commerce to disregard a sale as a sample, the respondent must establish that the sale was a true *de minimis* sample through appropriate procedures. *See, e.g., J.C. Hallman Mfg. Co. v. United States,* 13 CIT 1073, 1076, 728 F. Supp. 751, 753 (1989). Commerce inspects the following factors to decide whether an alleged sample is

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[2] FAG heavily relies on several cases that discuss the exclusion of certain sales from less than fair value ("LTFV") investigations. *See* FAG's Mem. Supp. Mot. J. Agency R. at 13–14. The sales information at issue, however, was collected pursuant to an administrative review, and not a LTFV investigation. While Commerce has the discretion to eliminate unusual sales from its LTFV investigations, *see* 19 C.F.R. § 353.42(b) (1994), this authority does not extend to administrative reviews which require that each entry be included. *See* 19 U.S.C. § 1675(a)(2)(A).

truly a sample: (1) whether ownership has changed hands; and (2) whether the sample was returned to the respondent, or destroyed in the testing process. *See Granular Polytetrafluoroethylene Resin from Japan; Final Results of Antidumping Duty Administrative Review,* 58 Fed. Reg. 50,343, 50,345 (1993). Further, because true samples are intended to be returned, they must be imported under a temporary import bond. *See J.C. Hallman,* 13 CIT at 1076, 728 F. Supp. at 753. In *J.C. Hallman,* this Court stated that

> [a sample] must [be] imported under [a] temporary importation bond as prescribed by the regulations. Compliance with the pertinent regulations is mandatory. Absent proof of importation of merchandise under bond for temporary purposes, or any other persuasive evidence to the contrary, Commerce would have no way of knowing that the merchandise *is not* imported for sale.

Id. (citations omitted).

In this case, FAG has merely claimed that the items it labeled as samples should be excluded from the USP calculations. FAG has failed to demonstrate that these items were true samples through the court-sanctioned procedures established by Commerce and approved in *J.C. Hallman.*

FAG's alternative argument is also without merit. First, under the ITA regulations, the decision to grant a COS deduction is within Commerce's discretion. *See* 19 C.F.R. § 353.56(a)(2); *see also Böwe Passat Reinigungs-Und Wäschereitechnik GmbH v. United States,* 20 CIT ___, ___, 926 F. Supp. 1138, 1149 (1996).

Second, ITA regulations state that Commerce may make a COS adjustment to FMV when there is a *"bona fide* difference in the circumstances of the sales [and] the amount of any price differential is wholly or partly due to such difference." 19 C.F.R. § 353.56(a)(1) (1994). The regulations further require that the claimed adjustments be directly related to the sales at issue. *Id.* Differences in circumstances of sale are differences caused by expenses such as commissions, credit terms, guarantees, warranties, technical assistance and servicing. 19 C.F.R. § 353.56(a)(2). Thus, the regulations clearly require that the reason for the COS adjustment be an expense that had an *effect* on the prices charged, rather than a mere difference in the prices charged. FAG has stated only that it is entitled to a COS adjustment because the sample sales were zero-priced.[3]

Consequently, FAG has failed to demonstrate that the different circumstances between its sample and prototype U.S. sales and its home market sales had an effect on the prices charged. Commerce's inclusion of the sales FAG labeled as samples for purposes of calculating USP is upheld.

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[3] As Commerce notes, to allow for a COS adjustment under these circumstances is contrary to the purpose of the dumping law since the same argument can be made for any dumped sale. Def.'s Partial Opp'n Pls.' Mots. J. Agency R. at 25–26. *See also Final Results,* 60 Fed. Reg. at 10,947–48.

3. *Conversion of Insurance Costs to Dollars in Cases in Which U.S. Sales Were Already Valued in Dollars:*

NSK-RHP claims that Commerce's SAS computer program improperly converted insurance costs to dollars in cases in which U.S. sales were already valued in dollars. NSK-RHP's Mem. Supp. Mot. J. Agency R. at 5–7. In essence, NSK-RHP contends that the values it reported for insurance costs were already denominated in dollars, and so, Commerce's additional conversion to dollars artificially decreased USP. *Id.* at 6.

Upon review, Commerce agrees that its computer program improperly converted the insurance costs to dollars and consents to a remand to correct the error. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 27.

After a review of the record, this Court concludes that Commerce's computer program improperly converted insurance costs that NSK-RHP already reported in dollars. Consequently, upon remand, Commerce is to correct the program so that the insurance cost values NSK-RHP reported in dollars are not further converted.

4. *Application of VAT to the HEDGE Value:*

NSK-RHP also claims that Commerce's SAS computer program applied VAT to the HEDGE value twice. NSK-RHP's Mem. Supp. Mot. J. Agency R. at 7–8. Commerce acknowledges that its computer program incorrectly applied VAT to the HEDGE value twice and consents to a remand to correct the error. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 27.

After a review of the record, this Court concludes that Commerce's computer program improperly applied VAT to the HEDGE value twice. Consequently, upon remand, Commerce is to correct the program so that VAT is only applied to the HEDGE value once.

5. *Application of Domestic Inland Freight Value for 1993 Purchase Price Transactions Involving RHP's Aerospace Division:*

NSK-RHP further claims that Commerce's SAS computer program double counts the value for domestic inland freight ("DIF") for 1993 purchase price transactions.[4] NSK-RHP's Mem. Supp. Mot. J. Agency R. at 8–9. In particular, NSK-RHP asserts that Commerce's computer program improperly applied the Aerospace Division's DIF allocation figure for May through December 1992 to the 1993 portion of the period of review. *Id.* at 8. According to NSK-RHP, the cost of production for the Aerospace Division already reflected the cost of DIF, and so, Commerce double counted the DIF charges for 1993. *Id.* at 9.

Commerce responds that no computer error occurred. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 27. Rather, Commerce explains that RHP failed to properly report DIF expenses for purchase price transactions for the period January 1993 through April 1993. *Id.* As a result, Commerce was forced to substitute RHP's reported DIF expenses for

[4] During the period of review, RHP's Aerospace Division was the sole supplier of product to purchase price customers. Def.'s App., Ex. 3, at 17.

May through December 1992 for the missing value in order for Commerce's computer program to properly calculate USP. *Id.* at 28. Consequently, Commerce states that if a double counting of DIF occurred, it was caused by RHP's unresponsive questionnaire answer. *Id.* at 29.

Torrington, as defendant-intervenor, adds that: (1) the evidence on the record is insufficient to demonstrate that Commerce's computer program double counted RHP's DIF expenses for purchase price transactions (Torrington's Opp'n to FAG's and NSK-RHP's Mots. J. Agency R. at 17–18); (2) if the computer program did double count DIF expenses, RHP's unresponsive reporting is to blame *(id.* at 18); and (3) RHP failed to make a timely request for a correction *(id.* at 18–19).

As a preliminary matter, Torrington's contention that RHP failed to promptly address the alleged error is incorrect. Torrington relies on *Neuweg Fertigung GmbH v. United States,* 16 CIT 724, 797 F. Supp. 1020 (1992) for the proposition that a respondent must complain about an alleged error before the final results are released. *Neuweg,* however, is distinguishable from this case. Following the publication of the preliminary results, the respondent in *Neuweg* was put on notice that Commerce had certain difficulties with the information that respondent provided. *Id.* at 728, 797 F. Supp. at 1023. In this case, Commerce supplied no such notice. Further, NSK-RHP informed Commerce of the alleged computer error in a timely fashion: one week after the Final Results were released and before the Final Results were published.

Further, Torrington's claim that the record is inconclusive as to whether double counting occurred is without merit. During the review, Commerce instructed RHP to report its DIF expenses incident to purchase price sales for the period January through April 1993. Def.'s App., Ex. 2, at Q35. RHP blatantly failed to respond to the question directly but, rather, indicated in its Response that it included DIF costs in its costs of production.[5] *See* Def.'s App., Ex. 3.

Pursuant to 19 U.S.C. § 1677a(d)(2)(A) (1988), Commerce is to deduct DIF expenses from the purchase price.[6] To compensate for RHP's reporting failure and effectuate the language of the statute, Commerce added language to its computer program to use RHP's response for DIF during May through December 1992 for the value designated as DIF for January through April 1993. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 28. As a result, the computer program double counted DIF for the relevant period. The issue that remains, therefore, is whether

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[5] RHP's Response stated the following:

Note: Starting in January 1993, Domestic Inland Freight costs have been included in the standard costs [of production] for the Aerospace Division. Therefore, no separate breakout of this expense is reported here.

Def.'s App., Ex. 3, at 18.

[6] 19 U.S.C. § 1677a(d)states, in relevant part:

(d) Adjustments to purchase price and exporter's sales price.—The purchase price and the exporter's sales price shall be adjusted by being—

* * * * * * *

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States.

NSK-RHP is entitled to a remand to correct double counting that occurred because of RHP's unresponsive reporting.

RHP's improper reporting was the cause of the double counting and is fatal to NSK-RHP's claim. "Ultimately it is the respondent's responsibility to make sure that the ITA understands, and correctly uses, any information provided by the respondent." *Neuweg,* 16 CIT at 728, 797 F. Supp. at 1024 (citation omitted). In this case, while RHP indicated that it had included DIF for the relevant period in the amount of costs of production, it not only failed to state the relevant DIF in the appropriate place, but also failed to provide the specific amount for that DIF allocation. Had RHP provided a breakdown of the costs of production it reported, stating the amount of DIF it included, Commerce would have been able to transfer the misallocated DIF amount to the proper place in the computer program calculations.

While Commerce *may* request factual information at any time during a proceeding, 19 C.F.R. § 353.31(b)(1) (1994), Commerce is not required to engage in a paper war to obtain responses to questions it has already explicitly asked. *See Sugiyama Chain Co. v. United States,* 16 CIT 526, 531, 797 F. Supp. 989, 994 (1992) ("if the burden of compiling, checking, rechecking, and finding mistakes in the submission of Plaintiffs were placed upon Commerce, it would transform the administrative process into a futility"). Indeed, "[t]he Plaintiff may not control the investigation by 'selectively providing the ITA with information * * *. It is for the ITA to conduct its antidumping investigation the way it sees fit, not the way the interested party seeks to have it conducted.'"). *Comitex Knitters, Ltd. v. United States,* 16 CIT 817, 821, 803 F. Supp. 410, 414 (1992) (citations omitted). Further, the respondent must fully cooperate with Commerce and provide accurate and timely information. *See Murata Mfg. Co. v. United States,* 17 CIT 259, 265, 820 F. Supp. 603, 607 (1993). When a foreign exporter refuses, or is unable, to provide Commerce complete, timely, or accurate information, Commerce may use "the best information available" to establish dumping margins. 19 U.S.C. § 1677e(b) (1988); 19 C.F.R. § 353.37(a)(1) (1994).

By merely stating that it included DIF in costs of production, RHP purposefully ignored Commerce's instructions to state DIF for January through April 1993 as a questionnaire response. Consequently, Commerce was fully justified in resorting to RHP's DIF allocation for May through December 1992 to compensate for the missing response and give effect to the statutorily required calculation.

6. *Inclusion of Below-Cost Sales in the Calculation of Profit for Constructed Value:*

Torrington claims that Commerce improperly included below-cost sales in its calculations of profit for use in constructed value ("CV"). Torrington's Mem. Supp. Mot. J. Agency R. at 13–22. Torrington contends that the inclusion of below-cost sales made in substantial quantities over an extended period of time distorts the statutory scheme because such sales are not in the ordinary course of trade. *Id.* at 19.

In the alternative, Torrington argues that assuming that below-cost sales should not be excluded in calculating profit, Commerce should have nevertheless recomputed profits on the basis of the sample sales reported. *Id.* at 19–22. In particular, Torrington claims that Commerce should have presumed that the sample sales reported by respondents would be representative of the profit for the general class or kind of merchandise, and so, should have computed respondents' profits based on either the sample sales reported or the average profit on all sales, whichever was greater. *Id.* at 20–21.

Commerce responds that the relevant statutes and case law support its inclusion of below-cost sales in the calculation of profit. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 32–33. In particular, neither the definition of CV, as stated in 19 U.S.C. § 1677b(e)(1) (1988), nor the definition of the ordinary course of trade, as stated in 19 U.S.C. § 1677(15) (1988), suggests that below-cost sales are outside the ordinary course of trade, and so, such costs should be included in the CV calculation. *Id.*

NSK-RHP agrees generally with the position taken by Commerce. NSK-RHP's Opp'n to Torrington's Mot. J. Agency R. at 4–6. FAG also agrees generally with the position taken by Commerce, emphasizing that the definition of FMV makes no reference to the exclusion of below-cost sales from the CV profit calculation. FAG's Opp'n to Torrington's Mot. J. Agency R. at 10–24.

The statutory language supports Commerce's position. In calculating CV, Commerce includes profits for sales of merchandise of the same general class or kind in the home market, in the usual quantities and in the ordinary course of trade. *See* 19 U.S.C. § 1677b(e)(1). The statute itself does not limit the meaning of "ordinary course of trade" to sales made above cost but, rather, defines it as "the conditions and practices which * * * have been normal in the trade under consideration with respect to merchandise of the same class or kind." 19 U.S.C. § 1677(15).

Further, this Court has recently concluded, in several cases, that for below-cost sales to be excluded from a CV calculation, a plaintiff must show that such sales were made outside the ordinary course of trade. *See Torrington,* Slip Op. 96–163, at 9–10; *Timken Co. v. United States,* 20 CIT ____, ____, 930 F. Supp. 621, 624–25 (1996); *Federal-Mogul Corp. v. United States,* 20 CIT ____, ____, 918 F. Supp. 386, 403 (1996); *Torrington Co. v. United States,* 19 CIT ____, ____, 881 F. Supp. 622, 633 (1995).

In this case, Torrington has claimed that merely because the sales are below cost and are made in substantial quantities over an extended period of time, they are outside of the ordinary course of trade. Torrington has not demonstrated that the below-cost sales at issue are actually outside of the ordinary course of trade. Consequently, as this Court has decided several times before, Commerce did not improperly include below-cost sales in calculating profit for CV purposes, and the inclusion of below-cost sales did not distort the statutory scheme.

This Court has also addressed Torrington's alternative argument and has concluded that it is without merit. In *Federal-Mogul,* the Court

stated that 19 U.S.C. § 1677f–1 (1988)[7] explicitly grants Commerce the authority to select appropriate samples for determining USP and FMV, as long as the samples are "representative" of the transactions under investigation. 20 CIT at ____, 918 F. Supp. at 403; *see also Torrington,* Slip Op. 96–163, at 11–12. The Court further noted, however, that because Commerce has such broad discretion in its sample selection methodology, Commerce should also have discretion not to use samples at all. *Id.* at ____, 918 F. Supp. at 404.[8]

In this case, as in *Federal-Mogul,* Commerce did not believe that the profit on the sale of such or similar merchandise could be presumed to be representative of the profit for the general class or kind of merchandise. *Final Results,* 60 Fed. Reg. at 10,923. Under this Court's rationale in *Federal-Mogul,* Commerce's decision not to rely on the reported samples for calculating CV is reasonable and in accordance with law.

7. *Use of CV to Calculate FMV for AFBs Sold Below Cost:*

Torrington also claims that Commerce resorted prematurely to CV during its FMV calculation. Torrington's Mem. Supp. Mot. J. Agency R. at 22–27. Specifically, Torrington contends that after finding that the most similar home market model was sold below cost in 90 percent of the home market sales, and over an extended period of time, Commerce resorted to CV without first determining whether there were any other similar models that could have served as price-based comparisons. *Id.* Torrington argues that there is a strong statutory preference for calculating FMV based on home market sales, rather than on CV. *Id.* at 23.

Commerce responds that 19 U.S.C. § 1677b(b) (1988) directs it to resort immediately to CV once Commerce finds and disregards all home market sales of "matching" merchandise. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 40–47. FAG agrees with the position taken by Commerce. FAG's Opp'n to Torrington's Mot. J. Agency R. at 25–30.

This Court recently addressed this issue and concluded that Commerce's methodology was reasonable. *See Federal-Mogul,* 20 CIT at ____, 918 F. Supp. at 394–97; *see also Torrington,* Slip Op. 96–163, at 14. To determine the amount of antidumping duties to be assessed on a particular entry of merchandise, Commerce is to compare the merchandise sold in the United States with "such or similar" merchandise, as defined by 19 U.S.C. § 1677(16), sold in the home country or to a third country. *See Federal-Mogul,* 20 CIT at ____, 918 F. Supp. at 395. Under its current methodology, Commerce disregards all home market sales and immediately resorts to CV if more than 90 percent of home market sales of the model were made below cost over an extended period of time, and are not at prices that permit recovery of all costs within a reasonable

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[7] 19 U.S.C. § 1677f–1 explicitly states that Commerce *may* use sampling techniques, and that

> *[t]he authority to select appropriate samples and averages shall rest exclusively with the administering authority; but such samples and averages shall be representative of the transactions under investigation.*

(Emphasis added).

[8] It is clear from the legislative history that section 1677f–1 does not require Commerce to use sampling but, rather, permits Commerce to use sampling when necessary. *See Torrington,* Slip Op. 96–163, at 12 n.2 (citing H.R. Rep. No. 725, 98th Cong., 2d Sess. 46 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5173).

period of time in the ordinary course of trade. *See Final Results,* 60 Fed. Reg. at 10,935–36.

As this Court decided in *Federal-Mogul* and *Torrington,* Commerce is not required to investigate whether it can make another match based on the next most similar merchandise before resorting to CV. *See Federal-Mogul,* 20 CIT at ____, 918 F. Supp. at 396; *Torrington,* Slip Op. 96–163, at 14. Indeed, the statutory language *requires* Commerce to resort to CV when sales are disregarded. *See* 19 U.S.C. § 1677b(b); *see also Zenith Elecs. Corp. v. United States,* 18 CIT ____, ____, 872 F. Supp. 992, 998–1000 (1994) (rejecting the argument that Commerce should use the actual prices of merchandise, rather than resort to CV, if any merchandise meeting one of the definitions of "such or similar merchandise" survives the cost of production test under 19 U.S.C. § 1677b(b)).

In this case, Commerce matched certain AFB models sold to the United States with identical AFB models sold in the home market. *See Final Results,* 60 Fed. Reg. at 10,935–36. After an investigation, Commerce concluded that the model AFBs were inadequate under 19 U.S.C. § 1677b(b), and so, Commerce used CV to determine FMV. *See id.* Commerce was not required to use the price of the next most similar merchandise. This methodology was upheld in *Federal-Mogul* and *Torrington* and is fully in accordance with law.

8. *Adjustment of FMV for Pre-Sale Inland Freight:*

In its *Final Results,* Commerce adjusted FMV for home market pre-sale inland freight. 60 Fed. Reg. at 10,941–42. Torrington claims that this deduction for pre-sale inland freight expenses is contrary to law. Torrington's Mem. Supp. Mot. J. Agency R. at 27–29.

Commerce contends that its FMV adjustment for pre-sale inland freight is reasonable and has been previously upheld by this Court, as well as the CAFC. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 47–48. FAG agrees generally with the position taken by Commerce. FAG's Opp'n to Torrington's Mot. J. Agency R. at 30–33.

When Commerce uses exporter's sales price to determine USP, it must adjust FMV by deducting indirect selling expenses. *See* 19 C.F.R. § 353.56(b)(2) (1994). In *Torrington Co. v. United States,* 68 F.3d 1347, 1356 (Fed. Cir. 1995), the CAFC held that, pursuant to the rationale of *Smith-Corona Group,* 713 F.2d at 1579, it was reasonable for Commerce to deduct indirect selling expenses, such as indirect transportation expenses, from FMV. *See also Torrington,* Slip Op. 96–163, at 15; *Timken,* 20 CIT at ____, 930 F. Supp. at 626–27. Hence, Commerce's adjustment of FMV for home market pre-sale freight expenses is sustained.

9. *Acceptance of RHP's Allocations of Inventory Write-offs and Write-downs:*

Torrington also claims that Commerce erred in accepting RHP's allocations of inventory write-offs and write-downs for all sales during the period of review. Torrington's Mem. Supp. Mot. J. Agency R. at 29–30. In particular, Torrington contends that write-offs and write-downs are model specific in their nature, and so, the costs should be

charged to the models involved. *Id.* Because RHP charged its inventory write-offs and write-downs to all company stock, as opposed to the particular models involved, the write-offs and write-downs for merchandise within the scope of the antidumping duty orders may have been charged partially to merchandise outside the scope of the antidumping duty orders, and vice versa. *Id.* at 30. Hence, Torrington asserts that Commerce should have reallocated these costs to the bearing model with the highest sales revenue in the United States during the period of review. *Id.*

Commerce responds that it properly accepted RHP's write-offs and write-downs because RHP's methodology was reasonable and in accordance with law. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 48–51. NSK-RHP agrees with the position taken by Commerce. NSK-RHP's Opp'n to Torrington's Mot. J. Agency R. at 6–7.

Commerce adheres to a firm's recording of costs if they are reported in accordance with the generally accepted accounting principles ("GAAP") of the firm's home country, so long as Commerce is satisfied that such principles reasonably reflect the costs of producing the merchandise. *See, e.g., Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From South Africa,* 60 Fed. Reg. 22,550, 22,556 (1995).

In this case, RHP reported its inventory write-offs and write-downs during the period of review by carrying forward a balance against all classes of stock, hence creating a reserve. *See Final Results,* 60 Fed. Reg. at 10,925. RHP then charged its write-offs and write-downs against this reserve. *See id.* Commerce accepted RHP's methodology of accounting for inventory write-offs and write-downs, finding that it was in accordance with the United Kingdom's GAAP and reasonably reflected the costs incurred in the production of the merchandise. *Id.*

Commerce's reliance on an individual firm's home country GAAP provides an objective standard by which to measure costs, and allows a respondent a predictable basis on which to compute the costs. Further, this Court has consistently upheld Commerce's reliance on a firm's expenses as recorded in the firm's financial statements, as long as those statements were prepared in accordance with the home country's GAAP and do not significantly distort the firm's actual costs. *See, e.g., Cemex, S.A. v. United States,* 19 CIT ____, ____, Slip Op. 95–72, at 19 (Apr. 24, 1995); *NTN Bearing Corp. Of America v. United States,* 17 CIT 713, 720, 826 F. Supp. 1435, 1441 (1993); *see also* H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1973) ("[I]n determining whether merchandise has been sold at less than cost, [Commerce] will employ accounting principles generally accepted in the home market of the country of exportation if [Commerce] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise"). Consequently, in this case, Commerce appropriately relied on RHP's recording of write-offs and write-downs, as they were recorded in accordance with the United Kingdom's GAAP and did not distort RHP's actual costs.

The Court concludes that Commerce's acceptance of RHP's method for accounting of its write-offs and write-downs was reasonable and in accordance with law. Further, any reallocation of costs to the bearing model with the highest sales revenue, as Torrington suggests, would artificially and unnecessarily inflate RHP's production costs.

10. *Decision Not to Investigate Whether Barden's AFBs Were Sold Below Cost:*

In addition, Torrington contends that Commerce erred in failing to examine whether Barden's home market sales were below cost. Torrington's Mem. Supp. Mot. J. Agency R. at 31–32. Torrington argues that, because FAG U.K. and Barden are related companies, and because Commerce treated them as a single entity for virtually every other purpose of the administrative review, Commerce should have examined Barden's sales as well as FAG U.K.'s sales. *Id.* at 31. Torrington supports this claim by noting that Commerce has previously collapsed affiliated companies, including FAG U.K. and Barden U.K. for purposes of the third antidumping investigation. *Id.*

Commerce responds that it did not conduct an investigation of Barden's home market sales because there had been no allegation that Barden had made below-cost sales, and because there were no sales by FAG U.K. of AFBs produced by Barden or sales by Barden of AFBs comparable to those resold by FAG U.K. Def.'s Partial Opp'n to Pls.' Mots. J. Agency R. at 51–58.

Further, Commerce decided to conduct a below-cost investigation of FAG U.K.'s home market sales because Commerce had found during the third review period that FAG U.K. had made sales below cost of products produced by an unrelated company. *Id.* at 54 (citing *Final Results,* 60 Fed. Reg. at 10,928). In contrast, Commerce states that it had reviewed Barden's sales in each of the previous antidumping reviews but had not found that Barden's AFBs were sold at below-cost. *Id.* Also, Barden's home market sales involved exclusively self-produced merchandise. *Id.* Hence, Commerce concludes that there was no reason to conduct an investigation on Barden's home market sales.

FAG agrees generally with the position taken by Commerce, emphasizing that, despite their affiliation, FAG U.K. and Barden were always separate and distinct companies and that below cost allegations must be company-specific and product-specific. FAG's Opp'n to Torrington's Mot. J. Agency R. 33–42.

Before conducting a below-cost investigation, Commerce is required to have "reasonable grounds to believe or suspect that sales in the home market of the country of exportation * * * have been made at [below cost]." 19 U.S.C. § 1677b(b); *see also* 19 C.F.R. § 353.51(a) (1994). "Reasonable grounds" has been defined as "a *specific* and *objective* basis for suspecting that a *particular* foreign firm is engaged in home market sales at prices below its cost of production * * *." *Al Tech Specialty Steel Corp. v. United States,* 16 CIT 245, 250, 575 F. Supp. 1277, 1282 (1983), *aff'd,* 745 F.2d 632 (Fed. Cir. 1984). Commerce has also found reasonable

grounds to exist in situations where a sufficient allegation of below-cost sales was made in the current administrative review and where the previous administrative proceeding resulted in an affirmative determination of below-cost sales. *See, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews,* 57 Fed. Reg. 10,868, 10,870 (1992).

In this case, there has been no allegation that Barden sold its AFBs at below cost during the fourth review period. Further, Commerce has not previously found that Barden made below-cost home market sales.

In addition, FAG U.K.'s below-cost sales during the third period of review do not constitute "reasonable grounds to believe or suspect" that Barden sold AFBs at below cost during the fourth review period for the following reasons. First, the allegation and finding of below-cost sales during the third review period involved solely AFBs produced by an unrelated party. *Final Results,* 60 Fed. Reg. at 10,928. Second, FAG U.K.'s and Barden's products were not connected in any way because Barden only sold its own AFBs and did not sell to or through FAG U.K., while FAG U.K. only resold AFBs produced by the unrelated producer. *Id.*

Consequently, Commerce's conclusion that reasonable grounds for an investigation did not exist is sustained and Commerce's decision not to investigate Barden's home market sales to determine whether they were made below cost is fully in accordance with law.

11. *Clerical Errors for FAG/Barden:*

Torrington alleges that Commerce made a clerical error in the Final Results regarding FAG/Barden U.S. sales. Torrington's Mem. Supp. Mot. J. Agency R. at 32–33. Commerce agrees that a clerical error was committed and consents to a remand to correct the error. After review of the record, the Court finds that a clerical error was made with respect to FAG/Barden U.S. sales and upon remand, Commerce is to correct this error.

CONCLUSION

In accordance with the foregoing opinion, this case is remanded to Commerce to allow it to: (1) utilize the approved tax-neutral methodology for adjusting for VAT; (2) correct the clerical error of the conversion of insurance costs to dollars in cases in which the U.S. sales were already valued in dollars; (3) correct the clerical error in the application of VAT to the HEDGE value; and (4) correct the clerical error with respect to FAG/Barden U.S. sales. The Final Results are sustained as to all other issues raised by FAG, NSK-RHP, and Torrington.

(Slip Op. 96–178)

TORRINGTON CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NMB THAI LTD., PELMEC THAI LTD., NMB HI-TECH BEARINGS LTD., AND NMB CORP., DEFENDANT-INTERVENORS

Court No. 96–07–01782

Defendant-intervenors move this Court pursuant to Rule 59 of the Rules of this Court requesting (1) a rehearing regarding the preliminary injunction granted on August 13, 1996, and (2) an order vacating the subject preliminary injunction. Defendant consents in part agreeing that the preliminary injunction should be vacated with respect to entries made on or after May 1, 1994.

Held: Defendant-intervenors' motion is granted in part to the extent that the Court vacates the preliminary injunction issued on August 13, 1996 with respect to the entries made on or after May 1, 1994.

[Defendant-intervenors' motion is granted in part and denied in part.]

(Dated November 4, 1996)

Stewart and Stewart (Terence P. Stewart, James R. Cannon, Jr., Geert De Prest and *Mara M. Burr)* for plaintiff.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis);* of counsel: *Stacy J. Ettinger,* Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

White & Case (William J. Clinton, Walter J. Spak, Christopher F. Corr and *Richard G. King)* for defendant-intervenors.

OPINION

TSOUCALAS, *Senior Judge:* NMB Thai Ltd., Pelmec Thai Ltd., NMB Hi-Tech Bearings Ltd. and NMB Corporation (collectively "NMB"), defendant-intervenors, move this Court pursuant to Rule 59 of the Rules of the Court for rehearing and reconsideration of plaintiff's application for preliminary injunction. NMB requests that the Court vacate the Preliminary Injunction Order dated August 13, 1996 and issue an order denying plaintiff's application.

BACKGROUND

Plaintiff, The Torrington Company ("Torrington"), brought this action contesting the final results of the fifth administrative review and revocation of the antidumping duty order covering antifriction bearings ("AFBs") imported from Thailand. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Thailand; Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order ("Final Results"),* 61 Fed. Reg. 33,711 (1996). In the challenged review, the Department of Commerce, International Trade Administration ("Commerce"), found *de minimus* margins for NMB during the period of review ("POR"), May 1, 1993 through April 30, 1994. Therefore, Commerce revoked the antidumping duty order on AFBs imported by NMB from Thailand entered, or withdrawn from warehouse, for consumption on or after May 1, 1994, and terminated

the review covering AFBs sold during the period of May 1, 1994 through April 30, 1995. *See Final Results,* 61 Fed. Reg. at 33,714.

Plaintiff commenced this case on July 26, 1996. On August 13, 1996, this Court issued an order granting Torrington's motion for a preliminary injunction restraining the United States Customs Service from liquidating entries of AFBs from Thailand entered after May 1, 1993.

DISCUSSION

NMB argues that a rehearing is appropriate in this case because the Court failed to issue a statement of findings of fact and conclusions of law supporting its decision to grant the preliminary injunction. NMB's Mem. Supp. Mot. Reh'g at 4 (citing 28 U.S.C. § 2645(a) (1994)). NMB maintains that the absence of such findings "constitutes a 'significant flaw in the conduct of the original proceeding,'" and, therefore, warrants a rehearing. NMB's Mem. Supp. Mot. Reh'g at 4 (quoting *Bousa, Inc. v. United States,* 17 CIT 568 (1993)). NMB also states that Torrington failed to present evidence supporting an injunction as to entries occurring after the POR. Specifically, NMB asserts that Torrington did not demonstrate that it would suffer irreparable harm from the liquidation of post-POR entries. NMB's Mem. Supp. Mot. Reh'g at 4–5. Finally, NMB claims that Torrington failed to support its claim of likelihood of success on the merits and, therefore, asserts that the injunction should be vacated with regards to both POR and post-POR entries. *Id.* at 5.

Torrington submitted an untimely opposition due to a document routing error; however, the Court accepts the filing. Torrington basically contends that there were no irregularities in the prior proceedings that necessitate a rehearing. Pl.'s Opp'n to Mot. Reh'g at 2–3.

Commerce did not file a response to this motion, but filed a partial opposition to Torrington's original motion for preliminary injunction. Commerce consented to an injunction for AFBs entered during the POR (May 1, 1993 through April 30, 1994). However, Commerce objected to Torrington's application for an injunction covering AFBs entered after April 30, 1994. With respect to those entries, Commerce insists that Torrington failed to establish the required elements of irreparable harm and likelihood of success on the merits. Def.'s Partial Opp'n to Mot. Prelim. Inj. at 8–18.

First of all, the Court grants NMB's motion for rehearing as the Court failed to consider NMB's and Commerce's opposition to Torrington's application for a preliminary injunction. Second, the Court agrees with Commerce that the preliminary injunction must be limited to POR entries. For the following reasons, however, the Court rejects NMB's assertion that the Court should vacate the preliminary injunction with respect to POR entries as well.

In order to obtain a preliminary injunction, a moving party carries the burden of establishing the following four factors: (1) that the movant is likely to succeed on the merits; (2) that the movant will suffer irreparable harm if the preliminary injunction is not granted; (3) that the balance of hardships favors the movant; and (4) that the requested relief

will not be contrary to the public interest. *FMC Corp. v. United States,* 3 F.3d 424, 427 (Fed. Cir. 1993). The Court will only address the fist two factors since they are the only ones at issue in this case.

In its application for a preliminary injunction, Torrington properly relied on *Zenith Radio Corp. v. United States,* 710 F.2d 806, 810–12 (Fed. Cir. 1983), to support its claim of irreparable injury. In *Zenith,* the Court of Appeals for the Federal Circuit ("CAFC") held that the consequences of liquidating entries covered by the POR constitute irreparable injury. Reliance on *Zenith* is sufficient to demonstrate irreparable harm. *FMC Corp.,* 3 F.3d at 430–31. Therefore, Torrington will suffer irreparable injury if the Court declines to enjoin the liquidation of those entries subject to the administrative review. In *Zenith,* the CAFC acknowledged that "[w]ithout a preliminary injunction, all of the entries *occurring during the review period* will be liquidated immediately, with dumping duties assessed in accordance with the margin set by the review determination." 710 F.2d at 810 (emphasis added). Thus, the decision in *Zenith* provides support for a contention of irreparable injury regarding POR entries only. Torrington failed to establish that it will suffer irreparable harm due to the liquidation of post-POR entries.

Torrington is also required to demonstrate that it is likely to prevail on the merits. The decision in *FMC* makes it clear that showing irreparable harm under *Zenith* does not obviate the need to show some likelihood of success on the merits. In *Floral Trade Council v. United States,* 17 CIT 1022, 1023 (1983), after finding that the plaintiff had established irreparable harm pursuant to *Zenith,* the court stated that even if a party cannot demonstrate that it is likely to succeed on the merits, a "serious question of law is sufficient grounds for a preliminary injunction if irreparable harm is clearly established." In its complaint, Torrington presented eight claims for relief. Several of those claims, most notably the claim regarding Commerce's failure to exclude related party sales not reflecting market prices from the calculation of profit, were addressed by this Court in *Federal-Mogul Corp. v. United States,* 20 CIT ____, 918 F. Supp. 386 (1996). In *Federal-Mogul,* 20 CIT at ____, 918 F. Supp. at 420, the Court remanded the case to Commerce to exclude such related party prices from its calculations. While the Court cannot say whether Torrington is likely to prevail based on the specific facts of this case, Torrington has raised a serious question of law. However, raising a serious question of law is insufficient to justify a preliminary injunction if plaintiff fails to demonstrate irreparable injury. Since Torrington has only shown irreparable injury with respect to POR-entries, the likelihood of success element is only satisfied to the same extent.

CONCLUSION

For the foregoing reasons, the Court concludes that Torrington is entitled to a preliminary injunction with respect to entries occurring between May 1, 1993 and April 30, 1994.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/90 10/16/96 Pogue, J.	Bayer Corporation (formerly known as Miles, Inc.)	96–05–01434	2929.10.55 12.8%	2929.10.27 Duty free	Agreed statement of facts	Norfolk m-Trifluoromethyl Phenyl Isocyanate
C96/91 10/18/96 Goldberg, J.	Lenox Collections, a division of Lenox, Incorporated	92–05–00324, 92–10–00714 and 93–02–00134	6911.10.80 26%	6913.10.50 9%	Lenox Collections *v.* United States ___ CIT ___, Slip Op. 96–30 (February 2, 1996)	Philadelphia Ornamental porcelain spice jars and canisters
C96/92 10/18/96 Goldberg, J.	Lenox Collections, a division of Lenox, Incorporated	96–05–001425	6911.10.80 25.5%	6913.10.50 Duty free	Lenox Collections *v.* United States ___ CIT ___, Slip Op. 96–30 (February 2, 1996)	Philadelphia and JFK, New York Ornamental porcelain spice jars and canisters
C96/93 10/18/96 Goldberg, J.	Lenox Collections, a division of Lenox, Incorporated	95–06–00752 and 95–12–01706	6911.10.80 25.5%	6913.10.50 9% or duty free depending on the date of entry	Lenox Collections *v.* United States ___ CIT ___, Slip Op. 96–30 (February 2, 1995)	Philadelphia and JFK, New York Ornamental porcelain spice jars and canisters
C96/94 10/21/96 Pogue, J.	Balgres Distributing Co.	94–12–00745 94–09–00532	6908.10.5000 19%	6802.99.00 6.5% 6802.92.00 6%	Agreed statement of facts	Miami Stone tiles
C96/95 10/21/96 Musgrave, J.	Nissho Iwai American Corporation	93–12–00824	6201.93.35 29.5%	6201.93.30 7.6%	Agreed statement of facts	Chicago Men's Nike brand anoraks, Style No. 350077
C96/96 10/21/96 Pogue, J.	Nissho Iwai American Corporation	95–01–00066	6201.93.35 29.5%	6201.93.30 7.6%	Agreed statement of facts	Los Angeles Men's Nike brand jacket, Style No. 155284
C96/97 10/29/96 Pogue, J.	Mine Technik America Inc. successor to Hemscheidt Corporation	95–11–01428	8479.89.90.99 8479.90.95.90 3.7%	8430.50.50, 8431.49.90 2.5%	Agreed statement of facts	Mobile Long wall coal mining support shields and parts

C96/98 10/29/96 Pogue, J.	Mine Technik America Inc. successor to Hemscheidt Corporation	95–11–01429	8479.89.90.99 8479.90.95.90 3.7%	8430.50.50, 8431.49.90 2.5%	Agreed statement of facts	Mobile Long wall coal mining support shields and parts
C96/99 11/1/96 Wallach, J.	Construction Fasteners, Inc.	95–04–00537	7318.12.00 12.5%	7318.14.10 5.2%	Agreed statement of facts	Philadelphia "Wood screws"
C96/100 11/1/96 Goldberg, J.	Lenox Collections, a division of Lenox, Inc.	92–05–00324–S, 92–10–00714–S, 93–02–00134–S, and 95–12–01706–S	6911.10.80 26%	6913.10.50 9%	Lenox Collections *v.* United States ___ CIT ___, Slip Op. 96–30 (February 2, 1996)	Philadelphia Ornamental porcelain jam jars and spice jars
C96/101 11/4/96 DiCarlo, J.	Brechteen Company	96–05–01320	3917.10.10 6.5%	4823.90.85 5.3%	Vista International Packaging Co. *v.* United States, Slip Op. 95–110, (June 14, 1995), Court No. 93–02–00074	Detroit Artificial fibrous sausage casings
C96/102 11/4/96 Pogue, J.	Alfred Letcher	96–05–01445	8802.20.00 4%	9705.00.0090 Duty free	Agreed statement of facts	Los Angeles Two historical aircraft, to wit, one 1917 Sopwith Camel and one SE 5A Camel
C96/103 11/6/96 Aquilino, J.	Nidec Corporation	90–12–00664	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Seattle Spindle motors
C96/104 11/6/96 Aquilino, J.	Nidec Corporation	90–12–00665	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/105 11/6/96 Aquilino, J.	Nidec Corporation	91–07–00508	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors

ABSTRACTED CLASSIFICATION DECISIONS—continued

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C96/106 11/6/96 Aquilino, J.	Nidec Corporation	91–09–00669	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/107 11/6/96 Aquilino, J.	Nidec Corporation	91–09–00712	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/108 11/6/96 Aquilino, J.	Nidec Corporation	91–10–00749	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/109 11/6/96 Aquilino, J.	Nidec Corporation	91–11–00785	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/110 11/6/96 Aquilino, J.	Nidec Corporation	91–11–00808	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	San Francisco Spindle motors
C96/111 11/6/96 Aquilino, J.	Nidec Corporation	92–03–00182	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/112 11/6/96 Aquilino, J.	Nidec Corporation	92–05–00344	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/113 11/6/96 Aquilino, J.	Nidec Corporation	92–05–00351	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors

C96/114 11/6/96 Aquilino, J.	Nidec Corporation	92–06–00373	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/115 11/6/96 Aquilino, J.	Nidec Corporation	92–09–00652	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors
C96/116 11/6/96 Aquilino, J.	Nidec Corporation	92–10–00677	8501.10.40 6.6% 8503.00.40 10%	8501.10.60 4.2% 8503.00.60 3%	Agreed statement of facts	Los Angeles Spindle motors

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